DRINKS, DRINKERS AND DRINKING,

OR

THE LAW AND HISTORY

OF

INTOXICATING LIQUORS

BY

R. VASHON ROGERS, JR.,
OF OSGOODE HALL, BARRISTER-AT-LAW.

ALBANY:
WEED, PARSONS AND COMPANY.
1881.

Entered, according to Act of Congress, in the year eighteen hundred and eighty-one,

BY JOHN D. PARSONS, JR.,

In the office of the Librarian of Congress, at Washington.

WEED, PARSONS AND COMPANY,
PRINTERS AND ELECTROTYPERS,
ALBANY, N. Y.

PREFACE.

THE object of a preface is three-fold — to explain the reason why of the book, to thank those who have assisted the author in his production, and to deprecate criticism. The more briefly this is done the better.

The subject of intemperance is one perpetually forcing itself upon every one who either acts or thinks or sees. Each year it becomes more important. The author knows of no book occupying the ground attempted to be covered by the following pages, and he thinks such a work is required to fill a gap in every library. How far he has succeeded in writing what the titles of the chapters show was intended, and what will be useful to the professional man as well as interesting to the general reader, is for others to say.

The assistants in this book have been the authors and judges whose writings have been quoted, and to them due acknowledgment has been given where their words have been cited.

The author is only too conscious of his shortcomings. The subject has proved far more extensive than he at first anticipated, and he fears that his provincial home has not been the best place wherein to write a booklet for use in the United States. Having, however, dared to trouble the public with his work he will try calmly to submit to the consequences, and take whatever the critics in their wisdom give.

R. V. R., Jr.

KINGSTON, ONT., *August*, 1881.

THE HISTORY AND LAWS

OF

INTOXICATING LIQUORS.

CHAPTER I.

INTOXICANTS.

THE fruit of the vine seems to have been used for the manufacture of drinks from the earliest ages. Some have even hazarded the opinion that the juices of the forbidden fruit were of an alcoholic quality, and ancient traditions attribute to the eating of the fatal tree of knowledge effects similar to those of intoxicating liquors. Milton represents Eve, on "tasting those fair apples," as becoming the subject of unnatural appetite and exhilaration:

> Greedily she engorged without restraint
> And knew not eating death: satiate at length
> And heighten'd as with wine, jocund and boon.

She thus describes her feelings to Adam,

> Opener mine eyes,
> Dim erst, dilated spirits, ampler heart,
> And growing up to godhead.

So she felt, yet the great poet exposes the delusion by a word,

> But in her cheek distemper flushing glowed.

Then the unhappy pair sin together, and

> As with new wine intoxicated both,
> They swim in mirth, and fancy that they feel
> Divinity within them, breeding wings
> Wherewith to scorn the earth; but that false fruit
> Far other operation first displayed,
> Carnal desire inflaming.

Then came the usual revulsion and shame.[1]

Whether alcohol was the forbidden fruit or not, it would appear highly probable that the old antediluvians had knowledge of the vine, expressed its juice and may have often allowed it to ferment before quaffing it. In the "World before the Flood" the wife of Enoch is made to walk

> 'midst fruits and flowers,
> Plucking the purple clusters from the vine
> To crown the cup of unfermented wine.

And — to pass from fancy to fact — among the remains of those singular aquatic races who built their houses over the lakes of Europe, from three to seven thousand years ago, are found proofs abundant that they possessed and enjoyed the grape.[2]

[1] Lees' Temperance Bible Commentary, 7.
[2] Keller's Lake Dwellers, pp. 61, 362.

We are told in sacred history that almost as soon as the subsided waters of the Flood had allowed the earth to put forth and bud, the wine of Noah's vineyard was both used and abused; the patriarch himself drank too deeply of that pleasant poison

> **Which since has overwhelmed and drowned**
> **Far greater numbers on dry ground,**
> **Of wretched mankind, one by one,**
> **Than e'er the flood before had done.**

Soon the use of the grape spread in all directions. The Scriptures contain many proofs of the excessive use of wine among the chosen people. Different words are used in different passages in Holy Writ; one, *Tirosh*, which is generally supposed to mean "must," or the unfermented juice of the grape; another, *Yayin*, or wine; and the third *Shekar*, or strong drink other than wine.[1]

Herodotus tells us that Cyrus, the Persian, on one occasion entrapped his enemies by leaving in their way "flowing goblets of wine." The hieroglyphics and pictures found upon the ancient monuments of Eygpt show that long before the Exodus wine was consumed in that country by many classes of society, and that the natives were much addicted to intemperance. At Thebes are still visible representations of wine-presses;

[1] Samuelson's History of Drink, ch. 5.

in other places, pictures of wine-dressers, men drawing wine from vats, servants handing cups to guests, slaves carrying their masters home drunk, maids tending their mistresses when overcome with wine.[1] Early in the Christian era Egyptian wine was exported to Greece and Rome, and highly prized. Athenæus tells us that the natives eat boiled cabbages for a first course at their feasts as a preventive against intoxication; they flavored their wine with resin or myrrh.

Confucius proves that long before his day — and he died 478 B. C. — the vine was known in the Flowery Kingdom; and much sage advice he gives against its excessive use. In Greece the origin of wine and wine-bibbing belongs to the mythical age. Dionysus, *alias* Bacchus, we are told, discovered the use of that liquid which, as Pliny says, "deprives a man of his reason, and drives him to frenzy and the commission of a thousand crimes." Blind old Homer sings of it with unctiousness and delight, and has his heroes constantly overcome with "ruby wine and ivy-wreathed cups of black wine," which they even carried about with them in their ships. He occasionally interjects a mild word of advice against excess, as to Ulysses, "Sweet wine hurts thee, it harms others also, whoever drinks it too abundantly." Dr. Schliemann's relics of ancient

[1] Wilkinson's Ancient Egyptians, vol. I, pp. 46, 52, 53.

Troy consist, in great part, of drinking vessels of gold and of silver and of earthenware, of every size, form and color; showing that the race that used them were highly convivial in their habits. At one time the Spartans were total abstainers; but even Lacedemon succumbed to luxury and wine-drinking. Temperance and simplicity of life did not long hold sway in Greece. Even B. C. 500 Panyasis, Herodotus' uncle, sang bacchanalianly,

> Good wine's the gift which god has given
> To man alone beneath the heaven,
> Of dance and song the genial sire,
> Of friendship gay and soft desire.

Yet even that poor Grecian knew that there was a thorn to the rose, for he adds, as with a sigh, it's "a useful slave but cruel master."[1] The Greeks watered their wine extensively, sometimes even putting in salt water for the sake of the flavor.

Wine, although it was well known to its inhabitants from the days of Romulus, was not introduced into general use in Rome until six hundred years after its foundation. After this it became very abundant. Pliny speaks of 195 different kinds. Its abundance is shown by the fact that when L. Lucullus returned to Rome he distributed 100,000 gallons among the people. Hor-

[1] Samuelson's History of Drink, ch. 7.

tensius (who gave up drinking wine and living, B. C. 50) left 10,000 casks of Chian wine to his heirs. The price of wine ranged from six pence per gallon to three pence for ten gallons. Maximin, the Emperor, often drank six gallons of wine a day, and without getting drunk. Novellius Torquatus, a noble who filled the highest offices of State, could toss off more than two gallons at a single draught. After reading of such men all modern topers appear almost like total abstainers, and it seems by no means strange that Pliny should write of the blotched and purple skin, the crimson nose, the bleared and watery eyes of these wine-drinkers, and of their sleep agitated by furies, as he calls *delirium tremens.*[1] The Romans, like their Grecian neighbors, mixed sea-water with their wine to promote digestion and to prevent it being too heady. They also added turpentine, resin, gypsum, almonds, parched salt, goat's milk, cedar cones, salts of lead and a variety of other things, which seem rather unsuitable, to improve and give flavor to their wines.[2]

It is to Christianity, or at least to its professors, that the credit belongs of having caused the growth of the grape and the consumption of wine to extend to Germany and the neighboring coun-

[1] History, Book IV, ch. 28.

[2] Morewood's History of Inventions, etc., in Inebriating Liquors.

tries. The holy sacrament necessitated its use, and so it is found that the first vineyards of any importance were planted round the great monasteries.[1]

Tacitus, in his Agricola, remarks that the Romans found England fit for the cultivation of all kinds of fruit trees except the vine and olive; but yet about A. D. 278 they began to plant vines and make wine there. Wine was a common drink among the Saxon nobles. The union of the wine-growing districts of France with the English crown under the Plantagenets made wine very plentiful in England, and according to a monastic chronicler, "filled the land with drink and drinkers."[2]

Chancellor Walworth, a man "of a marvellous industry, a keen intelligence, and wide and various learning," was once called upon to decide the question, Is ale intoxicating? He was, as a recent writer in an interesting sketch tells us, a teetotaler and president of the American Temperance Union,[3] so to him the maxim, *experimentum fiat in corpore proprio*, was useless; he, therefore, resorted to the experience of others in bygone days and distant lands, and produced a judgment of great research — "one of the most learned in the books" — and one of the most in-

[1] Samuelson, ch. V.
[2] Bridgett's Discipline of Drink, pp. 88, 89.
[3] Browne's Short Studies of Great Lawyers, p. 355.

teresting.[1] As it is well to speak of the intoxicating drinks of all times and climes the greater part of his opinion will be quoted; gleanings, which the learned Chancellor left behind him when he reaped the fruits of the toils of others, being here and there interjected. It must be remembered that he was thinking chiefly of ale.

"Herodotus, the oldest of the Grecian historians, who wrote nearly five hundred years before the commencement of the Christian era, and who traveled over Egypt and Italy as well as Greece, says the Egyptians used a liquor drawn from barley by fermentation,"[2] this was called *zythos*. The Father of historians seems to have considered that this was used as a substitute for wine in the lowlands of Egypt, but it is more reasonable to suppose that it was the drink of the poor in all parts of the country. "Athenæus, in his Feast of the Sophists, also cites Aristotle, the tutor of Alexander the Great, to show the intoxicating effects of beer among the Egyptians in his day; and that those who got drunk on it invariably lay upon their backs, while those who got drunk upon wine always lay upon their faces.[3] Beer was not only in general use in Egypt long previ-

[1] Nevin v. Ladue, 3 Denio, 437. The extracts are within quotation marks.

[2] Herodotus, Book II, § 77.

[3] Athen Deipnosophistæ, Lib. I, p. 16, c. p. 34 B; Lib. 10, p. 418 E. Lond. Ed. of 1612.

ous to the time of Herodotus, but it had found its way into other countries as well; or at least it was known in them at a much earlier period. It was known to Archilochus, the Grecian poet and satirist, who flourished about the time of the last of the Decennial Archons and near the end of the reign of the good king Hezekiah, seven hundred years before the Christian era, for he, as well as Sophocles, the tragedian, who wrote three hundred years later, calls this liquor "wine of barley." From the Greek poets we learn that this drink was used in their daily life as well as at their festive meetings. There is little doubt that the discovery of beer and its use as an exhilarating drink were nearly as early as that of the grape itself. "Dr. Robinson, in his Hebrew Lexicon, refers to Herodotus and also to Diodorus of Sicily, to show that the word *shekar*, usually translated 'strong drink' in King James' version of the Bible, means any inebriating liquor, and includes ale or beer. He also refers to St. Jerome to show that it includes mead or metheglin, an intoxicating beverage also well known to the ancients and sometimes called by them 'wine of honey.' And he might have added that in St. Jerome's time the word *sikera*, from the Hebrew *shekar*, to get drunk, was used to designate any kind of inebriating drink, whether made from grain, honey, juice of apples, dates or other fruits. Xenophon, who wrote between three and four

hundred years before the Christian era, shows that beer was then in use among the Armenians upon the borders of Kurdistan. In describing the retreat of the ten thousand Greeks, after the battle of Cunaxa, he makes mention of a fermented liquor prepared from grain, which the inhabitants of that country, through which they passed (like the more refined tipplers of the present day) sucked through a hollow reed or tube. The passage in Xenophon is thus translated: "There was also wheat, barley and legumens, and beer in jars in which the malt itself floated even with the brims of the vessels, and with it reeds, some large and others small without joints. These, when any one was dry, he was to take in his mouth and suck. The liquor was very strong when unmixed with water." The elder Pliny, who must have written shortly after the middle of the first century, as he perished at the eruption of Vesuvius which destroyed Herculaneum in A. D., 79, notices the intoxicating drinks which were in use among the different nations of his day. He says, the drinks of the Egyptians were manufactured from grain steeped in water; and that a similar liquor was used by the several nations who inhabited Europe, with which they intoxicated themselves. He notices the fact that the manner of making the liquor was somewhat dissimilar in Gaul, Spain and other countries; and that the people of Spain, in particular, brewed

the liquor so well that it kept good for a long time. It was called by different names, but its nature and properties were the same in all the nations where it was in use. And to show that even then it was considered a curse instead of a blessing to mankind, he remarks that, so exquisite is the ingenuity of men in gratifying their vicious appetites, that they have invented a method to make water itself intoxicate![1] Tacitus also, in describing the manners and customs of the Germans in his day, notices their drunken broils from the excessive use of beer, which was their usual beverage; and from his description it is clear that they understand the art of converting barley into malt.[2] "Perhaps the people of Spain had, as early as Pliny's time, discovered the antiseptic property of hops when mixed with ale or beer; although hops were not used in England until some centuries later" (in fact, not until the time of Henry IV).

"That the art of malting was in use before the Christian era may be inferred from Ovid. He describes the meeting of Ceres, when exhausted and weary, with an old woman, and when she requested water of her, the latter presented the goddess with some of this inebriating pro-

[1] Plin. Nat. Hist. Lib. 4, §§ 12, 22; Lib. 14, § 19.
[2] Tac. De Mor. German., §§ 22, 23, Diod. Sic. Lib. V.

duct of her own bounty — a liquor manufactured from dry grain.' The story is thus translated:

> 'The goddess knocking at the little door,
> 'Twas opened by a woman, old and poor;
> Who, when she asked for water, gave her ale
> Brewed long, but well preserved from being stale.'

At what time beer was first introduced into England is uncertain." It is supposed, however, that both the art of malting and the use of beer were introduced by the Romans. Beer and vinegar were the ordinary beverages of the soldiers under Julius Cæsar. Beer being so suitable to the English climate and so easily made by an agricultural people with plenty of corn, it was gladly welcomed and soon became the national beverage. Previous to this the usual drinks of the ancient Britons were water, milk and mead.[2] Some say that cider was early known to the Britons, in common with the other northern nations; and that when Cæsar invaded the island such was the acquaintance of its inhabitants with intoxicating liquors that intemperance and inebriety were ranked among the national vices.[3] "According to Morewood, Dioscorides (who wrote in the time of Nero) records the fact that the British and Irish then used an inebriating liquor called *curmi*,

[1] Ovid, Met. Lib. I.
[2] Enc. Brit. Article "Brewing," IX Ed.
[3] Morewood, p 523.

made from barley. Morewood also states that the manner of making ale or beer by the ancient Britons and other Celtic nations is thus described by Isodorus and by Orosius, who was a disciple of St. Augustine: 'The grain was steeped in water and made to germinate, by which its spirits were excited and set at liberty, and it was then dried and ground; after which it was infused in a certain quantity of water, and being fermented it became a pleasant, warming, strengthening and intoxicating beverage.'[1] After the expulsion of the Romans from Britain, the Saxons subdued the natives and learnt from them the art of brewing. "This liquor was called by the people of Spain *celia* and *ceria*. The Britons, as we have seen, called it *curmi*, and in Germany and Gaul, as well as among the Romans, it was called *cervisia* or *cerevisia*, from *Ceres*, the goddess of grain, and *vis*, power or strength. Its proper name in the English language, therefore, is strong liquor, or strong drink. Burkhardt, Salt, Bruce and other modern travelers in Egypt, Nubia, Abyssinia, etc., mention a similar liquor still in use in those countries under the name of *bouza*, which is made by fermenting barley and other farinacious substances with water, but without malting the grain, which makes a strong and inebriating drink and is in extensive use. And an

[1] Morewood, p. 530.

evidence of its intoxicating qualities is the fact, stated by one of those writers, that it is used sometimes to catch monkeys, who, like the bipeds they are so apt to imitate, are inclined to partake of the pleasures of the inebriating cup without duly considering the consequences. To effect his object, the monkey-catcher places a vessel filled with *bouza* at the foot of the tree in which the animals are gamboling, and then watches at a distance until they come down and regale themselves to intoxication; and we, who have seen the effect of similar proceedings elsewhere, can readily imagine what is the inevitable result of this stratagem to the bouzy monkeys."

"Perhaps the word *chica*, which was used by the aborigines of this continent as the name of an intoxicating beverage found among them at a very early day, and produced by the fermentation of maize or Indian corn, was derived from the Hebrew root *shakar*. Acosta, in his Natural History of the Indies (written in the sixteenth century), and Frezier, in his account of his voyage to the South Sea and the coast of Chili and Peru, about 1713, and other voyagers of that day, give the name and the disgusting mode of preparing that kind of beer among the Indians, in which the saliva of the females answered the purpose of barm in producing the vinous fermentation.[1]

[1] Acosta Hist. Nat. des Indes, p. 161; Voyage de Frezier, p. 62; Dampier's Voyage to Campeachy, p. 113.

De Lery, who visited America more than a century before Frezier and Dampier, also refers to the same custom.[1] Indeed, we learn from Garcilasso de la Vega's History of the Incas of Peru, that an intoxicating beer, produced by the fermentation of grain, was in use among the Peruvians long before they were first visited by the Europeans; and they probably carried the knowledge of the art of making it with them at that unascertained period of time when adventure or accident first brought them to this continent.[2] The Abbé Moulina, in his History of Chili, states the fact that the aborigines of that country, in burying their dead, deposited in the mound with them vessels filled with *chica* or beer, to subsist the deceased on his passage to the other world.[3] And it is worthy of remark that some of the earthen jars, found in the Chilian and Peruvian burying places, were similar in form and appearance to those which Lane says he saw in the tombs at the necropolis of ancient Thebes, and which contained the dregs of beer."[4]

According to Herodotus, a people in Africa made drink from the berries of the lotos. Lotos, the name — divine, nectareous juice,

[1] Voyage de J. De Lery, p. 124.
[2] Hist. des Incas, Tome 2, p. 196.
[3] Hist. of Chili, vol. II, p. 81.
[4] Lane's Modern Egyptians, vol. II, p. 34.

which, whoso tastes,
Insatiate riots in the sweet repasts;
Nor other home, nor other care intends,
But quits his house, his country and his friends.

According to Morewood, distillation was wholly unknown to the ancient Greeks and Romans. Some say it was discovered during the Augustan age; but, if it was, not much practical use was made of it. Geber, the Arabian savant, speaks of it, and gives directions as to practising the art. Morewood, however, refuses to give to the Arabians the honor of the discovery (in fact, he does not seem to think much of the Arabs), and thinks that they drew their knowledge from the cradle of the human race, the distant East. The word "alcohol" is, no doubt, from the Arabic, and signifies "the pure spirit;" originally the term was applied to a fine powder, used by the ladies to give additional brilliancy to their complexions. At first, alcohol was considered a poison, and no one thought of using it for a drink; about A. D. 1230 it came into vogue in the south of Europe; from thence it spread throughout the civilized world. Those old know-alls, the Chinese, appear to have understood the art of distilling, far back before the date of any of their authentic records.

It seems clear that distillation was introduced into England by the celebrated friar, Roger Bacon, about the thirteenth century. The knowledge of the process was confined for a long time

to the members of the religious houses (parsons then, as now, had a faculty of getting hold of good things), and its product was sold and used only as a medicine; but upon the dissolution of the monasteries, shortly before the middle of the sixteenth century, the knowledge of the art became general. It was commonly known, however, in Ireland long before the time of Henry VIII as *usquebaugh*.

In Morocco they have long distilled a brandy from the refuse of the grape, as well as from raisins. The Kaffirs have made for ages, and still make, a fermented drink of beer from the seed of the millet, which is first subjected to a malting process in all essential particulars identical with our own. The Zulus, also, use millet seed and a kind of rape seed for a like purpose. According to Mungo Park, the natives of Africa, also, make a beverage from the seeds of the spiked or eared soft-grass. The Abyssinians, like the Moors, extract a very strong brandy called *Shambacco* from the husks and stones of the grapes, after the juice is pressed out. The Russians drink *kvass* or *quass*, a thick, sour beverage, not unlike bouza, and made out of barley and rye-flour, mixed with water and fermented. Formerly the spruce, fir, birch, maple and ash trees were tapped and their sap used in England, after being fermented; the first two, indeed, until within the last fifty years. An old Welsh gene-

alogy says, "Ceranit, the drunkard, was the first who made malt liquor properly, and he gave himself up to drunkenness, in which state he died." The chief drink of the Norwegian was drawn from the birch-tree. The willow, poplar, sycamore and walnut also yield palatable drinks after fermentation. In Sweden a species of black ant is employed with rye to give flavor and potency to the brandy. *Koumiss*, the drink of the Tartar race, is the fermented milk of their mares; when they cannot get mare's milk, these wandering tribes use that of the cow, the sheep or the camel. They prefer the mare's milk, as it has an alkaline taste and yields one-tenth more alcohol than the cow's. The Circassian's favorite drink, *skhon*, is distilled from the mare's milk. Some say the Almighty himself revealed the knowledge of its manufacture to Abraham; others, that the angel showed Hagar the process when she was fainting from thirst in the wilderness.[1] The Afghans prepare a strong drink from the milk of sheep. The Khirghises make a very strong liquor from a berry called psak. In Thibet *chong* is made by fermenting wheat, rice or barley. The Chinese liquor, *sam-shee*, is from rice, and is not only intoxicating, but, like absinthe, peculiarly mischievous in its permanent effects. These Celestials are particularly skilful in distil-

[1] Morewood, p. 506 *et al.*

lation, and not only extract intoxicants from rice, the palm and various fruits, but also a very ardent spirit from mutton. This drink is said to be fit for the use of emperors. The most voluptuous orgies of the Mantchoo Tartars take place when they get drunk on this lamb wine. In France, at one time, they had a liquor somewhat akin to this, extracted from the flesh of calves, kids, chickens, fat hens, partridges, and cock-pheasants, pounded small, with some barley, the juice of fresh roses, citron and cinnamon-water added.[1] In the northern part of Formosa a spirit of considerable strength is made from wood-ashes. *Sakè*, a strong and wholesome beer, procured from rice, is the favorite drink in Japan, and has been so from remote ages. Miss Bird tells us that it has five distinct tastes — sweetness, sharpness, sourness, bitterness and astringency, with a flavor of fusil oil. It contains from 11 to 17 per cent of alcohol. Once upon a time a mikado dug a lake and filled it with sakè, and sailed about on it in a stately barge. The Japs also make wine from plums; they tap the palm and the birch, and ferment the juice, and distil a strong drink, conducive, they say, to long life, from the flowers of the motherwort and of the peach.[2]

The Kamtschatdales get a strong spirit from a

[1] Paré Works, ch. 3. [2] Morewood, p. 242.

reddish mushroom ; also a sweet but fiery, ardent, pungent beverage called *raka*, from a grass. From the Institutes of Manu it seems that the Hindoos had three intoxicants, one extracted from the dregs of sugar, another from bruised rice, and a third from the flowers of the madhuca tree. In Borneo, and some of the adjacent isles, a strong inebriating beverage is made from the roots of the pepper, or cava, plant ; these are chewed and then put in water or cocoanut milk, and quickly fermentation takes place ; the natives delight in it and indulge often to excess. In some places only young persons with good teeth are allowed to take part in the chewing process ; in others, only the the old women, while the young maidens merely add their saliva to thin the paste.[1] In Otaheite when one became drunk with this the usual remedy was to pluck his hair out by the roots.[2] In Madagascar a drink called *toupare* is made from the sugar cane ; it has a pungent, bitterish taste, not unlike beer highly hopped.

In South America, a favorite drink is *palque*, the fermented juice of the American aloe. *Guarapo* is the juice of the sugar cane, fermented ; it is the common tipple of the negro races in South America.[3] When the negroes of the West Indies could not procure rum, they made a fer-

[1] Morewood, p. 250.
[2] Cook's Voyages, vol. I, p. 350.
[3] Enc. Brit., Article, Brewing.

mented drink from the cassava plant. In Surinam the Indians make a similar drink; the women chew the bread or flower, and spitting it into a wooden bowl add water to it, and fermentation soon takes place.

In France very good brandies have been extracted from the root of the Jerusalem artichoke, potato-berries, potatoes themselves, and beets. In Hungary, brandy is distilled from both potatoes and plums, as well as grapes and elder berries. The Germans, too, make potato brandy. The modern Swiss solaces himself amid his Alpine snows with a spirit distilled from the gentian. In some of the Western Isles heather formed a principal ingredient in the beer, but the right way to use it has long since been forgotten. Drinking heather beer was one of the pleasures which departed heroes enjoyed in the society of the gods. In Cantyre, usquebaugh was drawn from thyme, mint, anise and other fragrant herbs.

In England, in the fifteenth century, water was looked upon as an unwholesome drink. The young princess, Catharine of Arragon, was instructed before she left Spain, "to accustom herself to drink wine, since the water in England was not drinkable, and even if it were, the climate would not allow the drinking of it."[1]

[1] The Discipline of Drink, p. 85.

About the same time Sir John Fortescue boasted that the English never drank water except as a penance. On the other hand, according to the old poet, no other kind of drink was unwelcome to the English taste:

> The Russ drinks quass; Dutch, Lübeck beer,
> And that is strong and mighty;
> The Breton,[1] he metheglin quaffs,
> The Irish, aqua vitæ;
> The French affects the Orleans grape,
> The Spaniard tastes his sherry:
> The English none of these can 'scape,
> But he with all makes merry.[2]

[1] *i. e.*, the Welshman.
[2] Heywood's Rape of Lucrece. (Percy Society.)

CHAPTER II.

HISTORICAL.

IN this chapter the rules and laws of divers nations, in different times, relative to intemperance and the use of intoxicants, will be briefly touched upon.

Turning first to the Ancient East. Among the Jews certain persons were strictly forbidden to use wine or strong drink, as Aaron and his successors in the high-priestly office.[1] The Nazarites — men separated to the Lord — were required to abstain, not only from wine and intoxicating drinks, but even from vinegar and any syrup or preparation of the grape, and from grapes themselves and raisins. All the days of their Nazariteship they were to eat nothing made of vine, from the kernel to the husk.[2] The Rechabites, too, were, by command, total abstainers,[3] and when trouble came upon the congregation, then eating of flesh and drinking of wine were forbidden to all.[4] Again and again, in both the Testaments, drunkenness is severely censured and pronounced a sin, and the drunkard is classed

[1] Lev. X, 9.
[2] Num. VI, 3.
[3] Jer. XXXV, 7.
[4] Polano's Talmud, p. 261.

with criminals of the deepest dye; and from one passage some argue that the punishment inflicted upon a drunkard was death — "all the men of the city shall stone him with stones that he die." [1]

Among the followers of Buddha the monks were bound to abstain totally from all intoxicating beverages; and even the laity who desired to raise themselves into a higher state of existence could not drink strong drink. To do so was to sin as grievously as to lie, steal or commit adultery. That wonderful man, Gautama, said to his listening disciples, "To cease and abstain from sin, to eschew strong drink, not to weary in well doing — this is the greatest blessing." [2] The laws of Manu (who lived in India somewhere between the sixth and the ninth centuries before Christ) contain many decrees against drunkenness; some are as follows: "Any twice-born (*i. e.* regenerated) man who has *intentionally* drunk the spirit of rice (sura) through perverse delusion of mind, may drink more spirit in flame and atone for his offence by severely burning his body," "or he may drink boiling hot, until he die, the urine of a cow, or pure water, or milk, or clarified butter, or juice expressed from cow dung." "If he tasted it *unknowingly*, he may expiate the sin by eating only a little broken rice, or grains of tila from which oil has been extracted, once

[1] Deut. XXI, 21. [2] Enc Brit., Article, Buddhism.

every night for a whole year, wrapped in coarse vesture of hairs from a cow's tail, or sitting unclothed in his house wearing his locks and beard uncut, and putting out the flag of a tavern-keeper." "The slayer of a priest, a soldier or merchant drinking arrack, mead or rum * * * are all considered offenders of the highest degree. * * * " Terrible punishments, such as branding the forehead with a hot iron, were the penalties attached to such crimes, "and with none to eat with them, with none to sacrifice with them, with none to read with them, with none to be allied by marriage with them, abject and excluded from all social duties, let them wander over this earth. Branded with indelible marks, they shall be deserted by their fraternal and maternal relations, treated by none with affection, received by none with respect." And after death the soul of the poor priest who has indulged in strong drink is consigned to the body of "a smaller or larger worm or insect, a moth, a fly, feeding on ordure, or some ravenous animal." [1] Notwithstanding these dire penalties drunkenness still continued rife among the Aryan races of India.

In respect of eating and drinking, the Persians were, in the earlier times, noted for their temperance and sobriety. Their sole drink was water.

[1] Institutes of Hindoo Law, ch. XI. Translated by Sir Wm Jones. Samuelson's History of Drink, ch. III.

Zoroaster strictly forbade his followers to indulge in drunkenness — even to simulate intoxication was deemed sinful. But these abstemious habits were soon put aside. Instead of water, wine became the usual beverage; each man prided himself upon the quantity he could drink; most banquets terminated in general intoxication. Drunkenness became a kind of institution. Once a year, at the feast of Mithras, the king of Persia (according to Duris), was bound to be drunk. A general practice arose of deliberating on all important affairs under the influence of wine, so that in every household, when a family crisis impended, intoxication was a duty; so, also, public affairs were discussed by the people after drink had rendered them incapable.[1]

Mohammedans as well as Buddhists and Brahmins are forbidden to use wine. The Koran says: "They will ask thee concerning wine and lots. Answer, in both these is great sin, and also some things of use to men; but their sinfulness is greater than their use."[2] And in another place it is written: "O, true believers, surely wine and lots and images and divining arrows are abominations and the works of Satan, therefore avoid them, that ye may prosper. Satan seeketh to sow dissension and hatred among you by means of wine and lots, and to divert you from remembering

[1] Rawlinson's Ancient Monarchies. [2] Chapter II.

God, and from prayer. Will ye not, therefore, abstain from these?"[1]

Soliman the First was such a true son of the prophet, that he caused molten lead to be poured down the throats of those who obstinately transgressed and took the forbidden cup. Although the Koran has one, if not more than one, passage, which seems to justify the use of intoxicating drinks in moderation, still the Mussulmans themselves regard wine and other intoxicants as unlawful, and a very large proportion of the faithful really abstain from their use.

In China, about 1116 B. C., an imperial edict was promulgated, called "The Announcement against Drunkenness." By this strange document it was directed that "the people" who drank should be put to death, while the ministers and officers of the government who so indulged should "be taught for a time." The Emperor, however, recognized the sad truth that "spirits are what men will not do without. To prohibit them, and secure a total abstinence from them is beyond the power even of sages."[2] The Chinese have laws regulating the sale of spirituous liquors, and guarding against irregularities. One such enactment says: "A man, who, intoxicated with liquor, commits outrages against the laws, shall be exiled to a desert country, there to remain in

[1] Chapter V. [2] Samuelson, ch. IV.

a state of servitude." With them occasional intoxication is not considered shameful, but treated with ridicule or pity; and the laws are only to restrain habitual and egregious offenders.[1]

The Egyptians indulged largely not only in wine, but also in beer, and the antiquarians have preserved a law, in force among them, forbidding the use of intoxicants among the people at large. Pliny tells us, that young men under thirty were not allowed to drink wine, except at the sacrifices.[2] What an incentive this must have been to the strict and regular performance of religious duties! Plutarch, in his "Treatise on Osiris and Isis,"[3] says: "As to wine, they (among the Egyptians) who wait upon the gods in the city of the Sun, carry absolutely none into the temple, as something not seemly to drink in the day-time, the Lord and King looking on; but the other priests use wine, a little, indeed, and they have many sacred solemnities free from it. Even the kings themselves, being of the order of priests, have their wine given to them according to a certain measure as prescribed in the sacred books. They began to drink this in the time of Psammetichus, previous to which they drank none at all. They think that drinking wine in quantities make men silly and mad." One Amen-em-an, an

[1] Morewood, p. 226.
[2] Williamson's Egyptians, vol. II, p. 167.
[3] Sec. VI.

official of the royal house, about the time of Moses, wrote to Pentaour, a poet, in the following strain: "If beer gets into a man it overcomes the mind. Thou art then like an oar starting from its place, which is unmanageable in every way. Thou art like a shrine without its god; like a house without its provisions, whose walls are found shaky. Thou knowest that wine is an abomination. Thou hast taken an oath concerning strong drink, that thou wouldst not take it. Hast thou forgotten thy resolution?"

In Greece a law of Pittacus, of Mitylene, enacted that any one who committed a crime when intoxicated should receive a double punishment; one for the crime itself, the other for the intoxication that led him to transgress.[1]

Plato, in his "Laws" (Book II), puts into the mouth of his Athenian guest certain remarks which the others pronounce to be very good. "In preference," he says, "to the custom of the Cretans and the Lacedemonians, I would favor the Carthaginian law, viz., that no one when in camp is to taste of wine, but is to exist upon water during the whole period; and that in a city neither a male nor a female slave should ever taste it; nor should magistrates during their term of office; nor rulers, nor judges engaged in business taste it all; nor any one who goes to any

[1] Puff. Law of Nat. B. VIII, ch. 3.

council to deliberate upon any matter of moment; neither should any one at all drink it in the day-time."

Among the many safeguards established to preserve female purity in Rome, was an enactment forbidding women even to taste the juice of the grape;[1] and this very intelligible law being enforced with the earliest education, became, at last, by habit and traditionary reverence, so incorporated with the moral feelings of the people, that its violation was spoken of as a monstrous crime. Aulus Gellius has preserved a passage in which Cato observes — in words which must make the advocates of women's rights think very little of the old philosopher — that "the husband has an absolute authority over his wife; it is for him to condemn and punish her, if she has been guilty of any shameful act, such as drinking wine or committing adultery."[2] This view of the law of husband and wife is not approved of in the republic of Massachusetts. A recent case there decides that even beating or striking a wife violently with the open hand is not allowable, although she be drunk or insolent.[3] The poet of the American Law Review thus gives the decision:

[1] Lecky's History of European Morals, vol. I, p. 95.
[2] Aulus Gellius, Noctes X, 23.
[3] Commonwealth v. McAfee, 108 Mass. 458.

Hugh McAfee, of Boston town,
Claimed that, at common law,
He had the right when she was drunk,
To beat his wife therefor.
As a defence he claimed it,
Upon his trial day;
And swore his wife was insolent,
And, when he struck, he never meant,
To take her life away.
Then out spake Reuben Chapman,
Chief justice of the court:
"To every woman in this State,
Life may be long or short,
But while I hold this office,
No woman in this land
Shall lawfully be beaten
By her husband's cruel hand."
Hugh McAfee, the husband, was
Convicted of manslaughter;
And thus the everlasting right
To every wife and daughter,
By brave old Reuben Chapman's act,
Was given on that day,
To get drunk, and be insolent,
Free from a husband's sway.

The Roman law on the subject is given by Dionysius Halicarnassus. Valerius Maximus says: "Vini usus olim Romanis feminis ignotus fuit, ne scilicet in aliquod dedecus prolaberentur; quia proximus a libero patre intemperantiæ gradus ad inconcessam venerem esse consuevit."[1] Pliny ascribes the promulgation of

[1] Val. Max. II, 1, § 5.

this law against women drinking wine to that mythical king, Romulus, and he mentions two instances in which women were put to death for thus offending; one, in which a wife was cudgelled to death by her husband because caught by him drinking wine out of the cask; the other, in which a lady was starved to death by her own relations because she had picked the lock of the box in which were the keys of the wine cellar; and a third instance where the transgressor paid for her sin by the loss of her dowry. Cato says that his countrymen were accustomed to kiss their wives for the purpose of discovering whether or no they had been drinking wine. The whirligig of time has changed this. Among the Anglo-Saxons the women now give these Judas kisses. The Bona Dea, it is said, was originally a woman named Fatua, famous for her modesty and fidelity to her husband; unfortunately having found a cask of wine in the cellar she got intoxicated, and her worthy spouse scourged her to death. He after repented of what he had done, and to make amends paid her divine honors. If it is true, as asserted, that her modesty was so great that after her marriage she never saw a man except her husband, 'tis little wonder that *ennui* drove her to the flowing bowl.

Toward the decline of the commonwealth and under the first emperors, the ladies were enfranchised and became accustomed not only to take

wine, but also to take it as copiously as did their lords, who — if Pliny is to be credited — far surpassed the moderns. Seneca complains bitterly, in his day, of the drinking habits of the women. In the time of Tertullian, the prohibition of the Roman women as to the use of wine was obsolete; and the love of the wine-cup was one of the great trials of St. Monica, as her worthy son has kindly informed all the ages.[1]

The Milesians, also, and the inhabitants of Marseilles, are said to have had laws directing their women to abstain from the juice of the grape.[2]

In the early days of Rome men were not allowed to use wine until of the mature age of thirty.

Under the old Roman law intemperance was not allowed to affect the liability of a criminal. The principal distinction which the jurists of Rome kept in view, namely, whether a crime was committed with a malicious intent, or *ex animi impetu*, was applied in later days to the case of drunkenness. They held drunkenness to be a kind of *impetus*, and that a drunken man when he committed a crime was equally punishable, but should not be put upon the same footing as an offender acting in cold blood and calculating his

[1] Augustine's Confessions, IX, 8.
[2] Aelian. Hist. Var. II, 38.

act with clear consciousness. Where the offence was of such a nature, that if committed without clear consciousness and a malicious intent, it would lose its injurious character and be no longer dangerous (as, for example, the offence of speaking against the government), or where, by reason of drunkenness, an act which would otherwise be a gross dereliction of official duty becomes only a *culpa* or fault; in these cases drunkenness was taken into consideration. If soldiers attempted to mutilate themselves or to commit suicide, their drunkenness was regarded as a mitigating circumstance. The Justinianean collection, however, contains no general principle declaring intemperance to be a ground of exculpation as to crimes and offences in general.[1]

To leave Europe for a time and glance at Asia, the Isles of the Sea, and the New World. In Burmah at one time intoxication was visited with the death penalty.[2] In the Society Islands it is enacted that if a man drinks spirits till he becomes intoxicated, and is then troublesome or mischievous, the magistrates shall cause him to be bound or confined, and, when the effects of the drink have subsided, shall admonish him not to offend again. But if he is obstinate in drinking spirits, and when intoxicated becomes mischievous, he is

[1] Mittermaier, Effect of Drunkenness upon Criminal Responsibility, § 1.

[2] Morewood's History, p. 175.

to be brought before the magistrate and sentenced to labor — if a man, at road-making or fence building; if a woman, at making mats or cloth.'

Among the ancient Mexicans, intemperance was considered a grievous crime and punished with the severest penalties. Young people found guilty were executed, and old persons were visited with loss of rank and confiscation of property.[2] Humboldt tells us that although drunkenness was very common in Mexico in his day, the punishment was severe, for tumbrils were sent round every night to collect the drunkards lying about the streets. The captives were then taken to the watch-house and afterward, with iron rings round their ankles, were compelled for three days successively to clean the streets of the city, as a punishment for their irregularities.[3]

Very early in the history of their nation the Germans, of all classes and both sexes, indulged freely in intoxicating beverages. Charlemagne tried by imperial edicts to reform the drinking habits of his subjects. He forbade suitors or witnesses to appear in court intoxicated, earls to sit in judgment unless perfectly sober, and priests to offer drink to penitents. Soldiers found drunk were restricted to water as a beverage until they

[1] Ellis, Polynesian Researches, vol. II, 433.
[2] Prescott, Conquest of Mexico, vol. I, 35.
[3] Political Essay on New Spain, vol. I, 100.

confessed their sin and asked forgiveness. But these edicts were of little avail; others were passed from time to time, such as those of Frederick III and Charles IV, ordering drunkenness to be severely punished.[1]

In Scotland, at a very early day, the brewing of ale and mead for sale, as well as the selling of wine, was controlled by law. The customs of the principal burghs were consolidated in the reign of David I (1124–1153), many of them being older than the twelfth century. A tax of four pence was paid for a yearly license to brew and sell ale. It was forbidden to carry the ale into another town to be sold. No one could sell it unless it had been brewed for sale and previously tasted. Public tasters were appointed to test and appraise the ale, and in so doing they were sworn to spare or favor no one. The measures used were to be all marked with the seal of the burgh. Public officials were forbidden to brew for sale. The brewing and selling seems to have been a peculiarly feminine occupation. One law was as follows: "What woman that will brew ale to sell shall brew all the year through, after the custome of the town. And if she does not, she shall be suspended of her office by the space of a year and a day, and she shall make good

[1] Petersen, Geschichte der Deutschen Nationalneigung zum Trunke, p. 128; Samuelson, ch. VIII.

ale and approvable as the time asks. And if she makes evil ale, and does against the custome of the town, and be convicted of it, she shall give to her amercement eight shillings or be put on the cuck-stool, and the ale shall be given to the poor folk, the two parts, and the third part sent to the brethren of the hospital. And each brewer shall put her ale wand outside her house at her window or above her door that it may be visible to all men. And if she do not she shall pay 4d. fine."[1] A public visitor of the burghs was appointed who had to see that all these things were carried out, and among other things, if the brewster-wives filled up the measures to the brim with ale or only with froth.

Many were the laws, enactments, decrees, canons, pastorals and regulations against the sin of intemperance promulgated by synods, councils, bishops and abbots, when the church of Rome bore undisputed sway over England, Ireland and Scotland. In A. D. 569, the bishops of the ancient Britons in synod assembled by St. David, enacted the following canons: 1. "Priests about to minister and drinking wine or strong drink (to excess), through negligence and not ignorance, must do penance three days. If they have been warned and despise, then forty days. 2.

[1] Ancient Laws of the Burghs of Scotland (Innes), pp. 18, 129, 162; Discipline of Drink, pp. 120, 121.

Those who get drunk through ignorance must do penance fifteen days; if through negligence, forty days; if through contempt, three quarantains. 3. He who forces another to get drunk out of hospitality must do penance, as if he had got drunk himself. 4. But he who out of hatred or wickedness, in order to disgrace or mock at others, forces them to get drunk, if he has not already sufficiently done penance, must do penance as a murderer of souls." A monastic law of St. Gildas, was that "if any monk, through drinking too freely, gets thick of speech, so that he cannot join in the psalmody, he is to be deprived of his supper."[1]

In the Irish church, St. Cummian Fota laid down the following rules: 1. "If a bishop or any one ordained has a habit of drunkenness, he must resign or be deposed. 2. If a monk drink till he vomits, he must do thirty days' penance; if a priest or deacon, forty days. But if this happens through weakness of stomach, or from long abstinence, and he was not in the habit of eating or drinking to excess, or if he did it in excess of joy on Christmas or Easter, or some saint's day, and if he then did not take more than the regulated amount, he is not to be punished. 3. If a Christian layman vomit through drunkenness, let him do fifteen days'

[1] Bridgett's Discipline of Drink, pp. 134, 135.

penance. 4. If a priest gets drunk through inadvertence, he must do penance seven days; if through carelessness, fifteen; if through contempt, forty; a deacon or a monk, four weeks; a sub-deacon, three; a layman, one week. 5. He who compels another to get drunk out of evil hospitality must do penance as if he himself had been drunk; if he did it out of hate he must be judged as a homicide."[1]

The Anglo-Saxon church was equally desirous of restraining this vice. At Clovesno at a council of the bishops of the province of Canterbury, it was directed (among other things), that no man should drink before ten o'clock, if not compelled by infirmity. For occasional intemperance, a layman had to do four or seven days' penance; clerks in minor orders, seven or fourteen; sub-deacons, two or three weeks; deacons, three or four weeks; priests, four or five, and bishops, five or six. Under St. Dunstan, it was ordered that no drinking should be allowed in the church. Shortly after (A. D. 970) a canon was passed forbidding priests to drink in taverns like laymen; and another against priests attending wakes, "exulting over dead men or seeking a corpse."[2]

The Fourth Lateran Council (A. D. 1215) decreed that all the clergy should carefully ab-

[1] Idem, pp. 141, 142.

[2] Discipline of Drink, pp. 148, 149, 150.

stain from gluttony and drunkenness; and this law was enforced by the synods and councils of England. The clergy, both there and in Ireland, were strictly forbidden to frequent taverns, and to attend scot-ales — meetings where each paid for his own share of the drink.[1]

Up to the period of the Reformation there was no civil legislation whatsoever in England against drunkenness. It is a crime not mentioned in the statute book until the fifth year of Edward VI. Up to that date, although the church was — as has just been seen — very busy trying to arrest the progress of intemperance, the action of the state was confined to the procuring of a supply of good and wholesome liquor to be sold at a moderate price.[2] The regulation of ale-houses and victualing-houses in England claimed the attention of the government at a very early day, and long before the art of distillation was known there. The manufacture of ale was mentioned in the laws of Ina, king of Wessex, and in 728 booths wherein to sell it were erected, and laws passed for their regulation. In the latter part of the tenth century King Edgar put down all ale-houses, except one in each borough or small town. The Norman kings regulated the prices of ale, and by statute in 1272, it was ordered that a brewer should sell two gallons of ale for

[1] Idem, p. 180.

[2] Idem, pp. 119, 129.

one penny in cities, and three or four for that price in the country. An edict of Henry VIII forbade the mixing of hops or sulphur with beer; but little attention seems to have been paid to the law, for in 1552 hop plantations were formed. In the fifth year of Edward VI privileges were granted to those hop grounds, and the poet Tusser thus sang:

> The hop for his profit I thus do exalt,
> It strengtheneth beer and flavoreth malt;
> And being well brewed, long kept it will last,
> And drawing abide, if you draw not too fast.

Hops came into common use in Elizabeth's reign. In 1649 the city of London petitioned Parliament against "hoppers" being used, urging that "this wicked weed would spoil the drink and endanger the lives of the people."

During the reign of the last Edward, and subsequently, many statutes were framed with the intention of punishing and preventing drunkenness. In 1552 power was given to justices of the peace to abolish ale-houses, and it was ordered that none should be opened without license.[1] Two years later an act was passed requiring taverns for the sale of wine to be licensed, and limiting the number of such houses in the different cities (forty were given to Lon-

[1] 5 Edw. VI, ch. 25.

don); a price was fixed for the wine, and none was allowed to be sold to be drunk on the premises. It was further enacted, "that it should not be lawful to any person, except he should dispend in lands, tenements, hereditaments, or other yearly profits certain, the sum of 100 marks, or else he be worth of his own proper goods and chattels 1,000 marks, or shall be the son of a duke, earl, viscount or baron of the realm, to have or keep in his house or custody any piece or vessel of any of the wines of Gascoign, Guyen, French or Rochel wines containing above the quantity of ten gallons, to the intent to spend or drink the same in his house, by any color or means."[1] In Elizabeth's days the ale drinkers had single beer and double beer, and double double beer, dagger ale, a kind called huff-cap, mad dog, angels' food, dragons' milk; these they drank until they were "as red as cocks and little wiser than their combs."[2] No wonder Shakespeare wrote: "In England," said Iago, "they are most potent in potting. Your Dane, your German, and your swag-bellied Hollander are nothing to your English."[3] A little later another writer thus speaks: "We seem to be steeped in liquors, or to be the dizzy island. We drink as

[1] Discipline of Drink, p. 186.
[2] Idem, p. 188.
[3] Othello, act II, sc. III.

if we were nothing but sponges, or had tunnels in our mouths; we are the grape-suckers of the earth."[1]

By 1 James I, ch. 9 (1604), it was provided that only travelers and their friends, laborers (at the dinner hour) or lodgers should receive entertainment at the inns and ale-houses, which, according to the act, were intended for the relief and lodging of wayfarers, and for the supply of the wants of such people as are not able, by greater quantities to make their provision of victuals; and not meant for entertainment and harbouring of lewd and idle people, to spend and consume their money and their time in lewd and drunken manner. By subsequent statutes, passed in the reign of this wise king,[2] after reciting that "the loathsome and odious sin of drunkenness had of late grown into common use within the realm, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery and such like," drunkenness was declared an offence against the public, and punished by a fine of five shillings to be paid within one week after conviction, to the church-wardens for the use of the poor; in default of payment the guilty party was placed for six hours in the stocks, in which time

[1] Reeve's Plea for Nineveh.

[2] 4 James I, ch. 5; 21 James I, ch. 7.

the statute presumed the offender would have recovered his senses and not be liable to do mischief to his neighbors. Upon a second conviction the transgressor was bound with two sureties, in the sum of £10, to keep good behavior. Tippling in ale-houses, except as allowed by the act of 1604, was punished by a fine of three shillings.

Chancellor Walworth says: The statutes of 5 and 6 Edward VI, ch. 25; 1 James I, ch. 9; 4 James I, ch. 5; 21 James I, ch. 7, and 1 Charles I, ch. 4, which were passed to regulate ale-houses and tippling-houses, all related merely to the retailing of ale, beer, wine, ardent spirits and other intoxicating beverages sold at such houses to be drank therein, and not to the manufacture or sale of such liquors to be used elsewhere. Nor was there any revenue or excise duty raised upon the granting of licenses to such houses. Those regulations and restrictions, however, applied to the sale of every kind of intoxicating beverages which was sold at such taverns or tippling-houses. But so far as related to the making or vending of ale or beer generally, there was no restriction. Nor was there any duty imposed thereon until about the middle of the seventeenth century. Both before and since that time there were not only common brewers, who made such liquors for sale to others, but many of the inhabitants had brewing materials, and manufactured the liquor for their own consumption. Morewood says it is a

common practice in Staffordshire, Shropshire and Warwickshire, as well as in the Midland counties, for women to brew; that many of them follow it as a livelihood, going from house to house as the wants or calls of the victuallers require; that this has been the practice for centuries; hence the term *ale-wives* as recorded in some of the old statutes.[1] The term as used in an early statute of Massachusetts did not refer to this class of brewing dames, but to their namesakes the herring, who probably derived their cognomen either from the redness of their gills, or from their attachment to ale or strong beer. Most likely the latter, for I see by a statute passed in the time of Cromwell,[2] that this intoxicating beverage has sometimes been used for the enticement of herring and some other fish into difficulty, as well as men and monkeys

In 1643 a tax was laid for one year upon ale and beer brewed by a common brewer, or by any private person who should sell or tap out such ale or beer, either publicly or privately; which tax upon home-manufactured articles was called by the new name of excise, as the duty upon the importation of articles from abroad was called an impost. This excise was continued from time to time by the Cromwellian Parliaments until the statute of 1656, chapter 19, before referred to;

[1] Morewood, 543. [2] Scobell's Stat. 458.

which appears to have been unlimited and to have continued in force until the Restoration. By that statute (the general principles of which seem to have been afterward adhered to in England), a distinction was made between ale or beer of a particular strength and value,—subsequently called strong-beer or porter,—and beer of a less value which assumed the name of small or table beer; both of which, however, were strong and intoxicating liquors. The excise upon the one, when brewed by a common brewer, or by any other person for sale, was fixed at two and six pence, and upon the other at six pence the barrel; and in the same proportion for a greater or less quantity. In the same statute an excise duty of two pence a gallon was imposed upon aqua vitæ, or strong waters, distilled within the commonwealth. A duty of two and six pence the hogshead was also imposed upon cider and perry made and sold by retail; and a penny a gallon upon mead and metheglin and such like drinks thus made and sold. And the act concludes with a proviso, before alluded to, that the excise duty thereby imposed shall not extend to salt used in salting herrings, etc., or to beer used for taking them.[1]

Immediately after the Restoration the same excise duty was granted to Charles the Second and

[1] Scob. Stat. 452.

his successors; and this excise tax was farmed out during his life.[1] After his death the excise duty was continued to his successors with various modifications from time to time until 1830, when the excise upon cider and perry was abolished. The excise duty upon all the other intoxicating b erages manufactured for sale, including mead metheglin, still continues in England. At the union in 1707, the excise duties on beer, etc., were extended to Scotland, and a malt liquor of intermediate strength, in use there, called two-penny ale, was also provided for.

The first colonial act for laying an excise on all strong liquors retailed in this colony (New York) was passed in October, 1713. In 1709 an act had been passed for laying an excise on all liquors, retailed, for one year; this had been continued. The act of 1713 placed excise on all strong liquors, beer and cider only excepted. Beer and cider are thus classed as strong liquors. The revision of this act in 1788 uses the words "spirituous liquors" as well as "strong liquors." The term "strong waters" used in Cromwell's statute and in 26 Geo. II, ch. 31, was a technical term used in the same sense as *aqua vitæ* to designate the clear and colorless fluid, resembling liquid water produced by distillation only. Entirely different from the "strong drink"

[1] Stat. 12 Charles II, ch. 8.

spoken of in James' version of the Bible, or the "strong liquor" of the act of 1713.[1]

The habit of gin-drinking, the master-curse of English life,[2] to which most of the crime and an immense proportion of the misery of the nation may be ascribed, if it did not absolutely originate, at least became, for the first time, a national vice, in the early Hanoverian period. Drunkenness, it is true, had long been common; but the dissipated habits of the Restoration, and especially the growing custom of drinking toasts, greatly increased the evil. Among the poor in the beginning of the eighteenth century the popular beverage was still ale or beer. In 1689 the importation of spirits was prohibited, and the trade of distilling, on payment of certain duties, was thrown open to all English subjects. These measures laid the foundation of the great extension of the English manufacture of spirits; but it was not until 1724 that the passion for gin-drinking appears to have affected the masses, and then it spread with the rapidity and violence of an epidemic. As Lecky says, small as is the place which this fact occupies in English history, it was probably the most momentous in that of the eighteenth century, incomparably more so than any event in the purely political or military annals of the

[1] Nevin v. Ladue, 3 Denio, 437.

[2] Lecky's England in XVIII Century, pp. 516–522.

country. The increase in the quantity yearly distilled was tremendous; while half a million gallons of spirits was about all that was made in 1684, in 1714 at least two millions were distilled, in 1727 it had risen to over three and a half millions, and in 1735 to 5,394,000 gallons. "Drunk for a penny, dead drunk for two pence, clean straw for nothing;" was the common advertisement of retailers of gin. To stay this frightful plague, in 1736, Sir J. Jekyll brought in and carried a measure through Parliament imposing a duty of twenty shillings a gallon on all spirituous liquors, and prohibiting their sale in less quantities than two gallons without paying a tax of £50 a year.[1] This, if it could have been enforced, would have amounted almost to prohibition, but it was too late to stem the torrent of drink by an act of Parliament. Violent riots ensued. In 1737 the consumption sank to what it had been ten years before; but a clandestine retail trade soon sprang up, which, being at once very lucrative and very popular, increased so that it was found impossible to restrain it. In 1742 more than seven million gallons were distilled, and the consumption was steadily augmenting. In 1743 an attempt was made to suppress the illicit trade and at the same time to increase the revenue by a bill[2] lowering the duties on most spirits to one penny

[1] 9 Geo. II, ch. 23.

[2] 16 Geo. II, ch. 8.

on the gallon, levied at the still-head, and reducing the price of retail licenses to twenty shillings. This act did nothing to discourage drunkenness or smuggling. Crime and immorality of every description rapidly increased. It was computed that in 1750 and 1751 more than eleven millions of gallons of spirits were each year consumed, and the increase of population, especially in London, appears to have been perceptibly checked. In 1751, however, some new and stringent measures were carried under the Pelham ministry, which had real and very considerable effect.[1] Distillers were prohibited under a penalty of £10 from either retailing spirituous liquors themselves, or selling them to unlicensed retailers. Debts contracted for liquors, not amounting to twenty shillings at a time, were made irrecoverable at law. Retail licenses were conceded only to £10 householders within the bills of mortality, and to traders who were subject to certain parochial rates without them; and the penalties for unlicensed selling were greatly increased. For the second offence the unlawful dealer was liable to three months' imprisonment and to whipping; for the third, he incurred the penalty of transportation.

Two years later another useful law was carried, restricting the liberty of magistrates in issuing

[1] 24 Geo. II, ch. 40.

licenses, and subjecting public houses to severe regulations.[1] Though much less ambitious than the act of 1736, these measures were far more efficacious, and they form a striking instance of the manner in which legislation, if not over-strained, or ill-timed, can improve the morals of the people. Still these laws formed a palliation and not a cure, and from the early years of the eighteenth century gin-drinking has never ceased to be, in England, the main counteracting influence to the moral, intellectual and physical benefits that might be expected from increased commercial prosperity.[2]

[1] 26 Geo. II, ch. 13

[2] Lecky's History of England in the Eighteenth Century, p. 522.

CHAPTER III.

DRUNKENNESS, DIPSOMANIA, DELIRIUM TREMENS.

DRUNKENNESS, in its ordinary signification, is that state of the body and mind which is produced by the too great use of alcoholic liquors. In a word, it is alcoholic poisoning.

The sages of the law do not appear to have ever strictly defined it.

If the potations have been deep or strong the effects may be evident in two or three minutes; if the quantity or strength of the alcoholic liquid taken in has been inconsiderable, the symptoms of intoxication may not appear for more than an hour. The first effect of this fiery substance is generally a diffused glow, spreading throughout the whole body as from a central heat; a comfortable feeling of self-satisfaction accompanies this, and is reflected upon the world at large, every thing is *couleur de rose;* even to the man habitually sad and downcast — of vinegar aspect — the world begins to blossom as the rose, and to appear not such a bad place after all. The brain works more rapidly as the pulse beats

quicker; but rapidity of thought does not always imply clearness of mental vision; soon there is a slight confusion in the upper story, and the windows of the mind become darkened. The joyousness and mirth continue; the spirit is buoyant; all is light and bright; the victim is talkative, and like Bunyan's gentleman of that name, will converse with equal fluency on any subject. He sings too, for as the Nubians say alcohol is "the mother of nightingales." But after a time the tongue trips, the words slip, stumble, tumble. The speech stammers and soon becomes indistinct. The man feels giddy; thinks the world is spinning round too fast, wishes that Ptolemy was right and Copernicus wrong; sees double. There are abrupt, almost unconscious, jerkings and movements of the limbs. His articulation being indistinct, he endeavors to remedy the defect by pitching his voice in a higher key. According to his natural constitution, he becomes irritable and bellicose, or friendly and amorous. In many the "softer flame," of Burns, burns not brighter, but stronger and more vividly when fed by fiery alcohol. Now, there is a thorough want of connection between the impressions conveyed to his fevered brain, and those received by his tingling nerves. He sees his glass or bottle, grasps at it, misses it, or spills its contents, perhaps stumbles, possibly

falls. He no longer knows what he does; nor does what he wishes; sometimes even he "tipples imaginary pots of ale."

At length the tongue, at first quick, then stammering, next slow, becomes still and dumb; the torrent of his words, dammed up by the fatal liquor, altogether ceases; he is no longer master of his mind or body, but is fast bound by the chains of his subtle enemy in body and soul. Insensibility, a sort of hideous sleep, full of foul dreams and horrid nightmares succeeds. The countenance is bloated and suffused, the eye is turned in, the pupil dilated, fixed, lustrous, the lips are livid, the breathing becomes hard and stertorous. A man may sleep off his drunkenness, or he may cast off part of the poison by vomiting before it is absorbed into his system. Sometimes he fails to do either, and the poison does its perfect work, and instead of sleep its twin brother death comes on, and as its dread shadow falls over the wretched drunkard, its approach is shown by a pallid face, cold beads of perspiration at every pore, a pulse quickly but feebly quivering, and a relaxing of all the muscles.[1]

The ancient fable tells us that when, after leaving the ark, Noah planted the vine he killed a sheep, a lion, an ape and a sow, and, having mingled their blood together, poured it upon the

[1] Browne's Medical Jurisprudence of Insanity, *in situ*.

plant, which then absorbed into itself the natures of these different animals; so that ever after the use of the fruit of the vine has given to the drinker in succession — the stupidity of the sheep, the boldness of the lion, the nonsensical noisiness of the ape, and the filthy brutishness of the sow. George Gascoigne, in his "Delicate Diet for Daintie Mouthde Dronkardes," says: "All dronkardes are beasts;" and graphically he describes the ape-drunk, the lion-drunk, the swine-drunk, the sheep-drunk, the maudlen-drunk, the martin-drunk, the goat-drunk, and the fox-drunk.

Browne, in the work on "The Medical Jurisprudence of Insanity," arranges all drunkards in one or other of the following classes: First. The Accidental; as children who, unconscious of the effects of alcoholic liquors, drink to excess; and men led away by joy, by friends, by physical feelings, and unintentionally drinking to excess. Second. The Regular; he who gets inebriated whenever it suits him, at stated, regular times and seasons. He is a sane drunkard; his passion is under control, but when he will he throws the rein on its neck and lets it go. When he chooses he can refuse to look 'upon the wine when it is red, when it giveth his color to the cup, when it moveth itself aright;' and he does refuse when he thinks the serpent's bite and the adder's sting will be too sharp and venomous for his present purpose; but at other times he cares not for woe

or sorrow, contentions or babblings, wounds or redness of eyes. Third. The Tippler; one almost, but not altogether, a drunkard; one ever drinking, but never drunk. He oftener obtrudes his soaked and spirit-logged body upon the physician than his deeds upon the lawyer. He agrees not with the Japanese maxim, 'to drink seldom, but heartily when at it, is better than to tipple frequently and in small quantities.' Fourth. The Habitual. Through repeated indulgences the habit to indulge becomes stronger, the bodily craving grows in strength and other motives lose their weight. In this way the moral sense becomes obscured, the self-respect and the self-restraint which depend so much upon the moral estimate of one's worth are no longer guiding principles of life; the man has become the slave of an artificial appetite, and is no longer the free ruler of his own conduct. His organism rules over him, and the rule is not that of a constitutional monarch who is governing in conformity with the laws of health, but the tyranny of a despot who is ruling with the caprice of disease. Here we pass from habitual drunkenness to dipsomania. Dr. Crichton Browne says, 'The essential distinction appears to me to be that in habitual drunkenness the indulgence of the propensity is voluntary, and may be foregone, and in dipsomania it is not so. The drunkard, as a rule, urges some external excuse for his debauch,

whereas with the dipsomaniac it is the internal craving. With the dipsomaniac it is the *vis a tergo*, with the drunkard it is the *vis a fronte*. The dipsomaniac is driven into the debauch by an impulse; the drunkard seeks the intoxicating effects.'

Mania â potu is very often confounded with, but is really to be scientifically distinguished from, drunkenness. It is not in fact drunkenness at all, but it is the maniacal excitement which sometimes comes on as intoxication is passing off. It must also be distinguished from *delirium tremens*. It is independent of any constitutional habit, and may occur in a person who has never habitually taken intoxicating beverages. The symptoms of most value in a differential diagnosis between *mania â potu* and *delirium tremens* are, perhaps, these, that while the former continues from one to two weeks, the latter terminates in about eight days. The delusions characteristic of the one disease are also found in connection with the other.

Delirium tremens is a disease which owes its origin to constitutional habit. It is a disease of the habitual drinker; it is also the portion of the tippler. Abstinence from indulgence in stimulants is not unfrequently the proximate cause of this attack; but an exhausting disease, or a severe injury, following upon a long course of intemper-

ance, has been found to lead directly to *delirium tremens.*

There is not much difficulty in distinguishing the delirium of the drunkard from ordinary delirium. The previous history of the case is generally sufficient to decide the matter; but there are many characteristic symptoms which would facilitate a decision even if the past were unknown. The sufferer is sleepless, restless, timid, suspicious and cunning. He is subject to illusions of the senses, and they in most cases are productive of fear; most of them are painful, hideous or disgusting. The individual not unfrequently believes himself to be the subject of persecution. If he hears voices, they are threatening, if he sees visions, they are loathsome. In its inception the disease is marked by a slight tremor of the hands, and in so far as these organs are concerned, by an uncertainty of muscular action. The appetite is almost always impaired; the skin is pale, cold and clammy; the tongue moist, white, tremulous, and the pulse small and weak. The delirium which supervenes is not constant, and is frequently found to come on at night. After a time, however, there are no remissions in the delirium, which may last for three or four days. Recovery, when it takes place, comes after sleep, which is at first uneasy and only enjoyed in snatches, but at length becomes quiet and refreshing. When ordinary

sleep does not come, a sounder slumber falls upon the sufferer; there is no more troubling, and the weary one is at rest.

The delirium of this disease bears a strong resemblance to dreaming. The patient is anxious to go somewhere; he must rise; he cannot stay in bed; he will be too late; it is unkind to say, 'lie still,' he must go — or something must be done. He will cry if his intention is thwarted, although it is a purposeless intention, a road without a goal. Almost invariably his delusions are associated with fear and suspicion. Those about him are suspected of many nefarious designs, and so painfully does the fear of coming evil oppress him that attempts to escape are not uncommon, and the patient, with a view of ridding himself of the horrors which torment his senses, and the unutterable fear which torments his mind, will endeavor to do violence to himself or others. Many cases are on record which show that atrocious crimes have been committed by persons laboring under this disease.[1]

[1] Browne's Medical Jurisprudence of Insanity, *insitu.*

CHAPTER IV.

DEFINITIONS.

A MAN may truly be said to have "intemperate habits" if it is his rule to drink to intoxication whenever occasion offers, and sobriety is the exception with him. It is not necessary that he should be drunk every day before his habits can be called "intemperate," nor will his getting drunk two or three times a year justify the use of such an adjective when speaking of his habits.[1]

A "common drunkard" is not a regular tippler, but one who is frequently drunk. Proof that one was drunk six times on six different days in three months, when there was no evidence of his state on the other days, does not entitle him to the presumption that he was sober on the other days. The rule of law is that people and things are presumed to continue *in statu quo*.[2]

An "habitual drunkard" is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the tempta-

[1] Tatum v. State, 63 Ala. 147.
[2] Com. v. McNamee, 112 Mass. 285.

tion is presented by his being near where liquor is sold.'

In California, a jury was instructed by the judge that to render a man an "habitual drunkard," the "intoxication must be such as to completely disqualify him from attending to his business avocations." But the court held that that was laying down the rule in too stringent a manner, and that if there is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance.[2]

The Iowa Supreme Court had occasion, on an application for a divorce on the ground of habitual drunkenness, to consider this point and when referring to the Californian case remarked: 'This definition (the one in *Mahone* v. *Mahone*) was sufficient for the case in hand, but we do not understand it to have been held that nothing short of the standard fixed in that case would be. It is not regarded as necessary to affirmatively define what constitutes habitual drunkenness. We are not prepared to say, however, if a person has a fixed habit of drinking intoxicating liquors to excess, is frequently drunk, and that such is his condition during the night and in hours not

[1] Magahay v. Magahay, 35 Mich. 210.
[2] Mahone v. Mahone, 19 Cal. 627.

devoted to business, that his wife would not be entitled to a divorce."[1] In England, "habitual drunkenness" is not cruelty in the eye of the law (N. B. 'Tis strange that justice should be blind and law a Polyphemus) so to entitle a wife to divorce.[2]

Drunkenness is a species of insanity.[3]

One cannot be said to be "in the habit of becoming intoxicated," who has only once been seen drunk and who sometimes takes a drink.[4] The phrase, "addicted to the excessive use of intoxicating liquors," means not the occasional excessive use, but the habitual excessive use.[5] A court being called upon to define, in an insurance case, what was meant by saying that "a man had always been sober and temperate," very wisely concluded that such a thing could not be said of one who, although usually sober and temperate in his habits, yet occasionally indulges in drinking debauches which sometimes end in *delirium tremens*.[6]

To say that a man is "intemperate" does not necessarily imply that he is in the habit of get-

[1] 22 A. L. J. 66.

[2] L. R., 1 P. & M. 46.

[3] Duffield v. Robesen, 2 Harr. 375.

[4] Calder v. Sheppard, 61 Ind. 219.

[5] Mowry v. Home Ins. Co., 1 Big. Life and Acc. Ins. Co. Cas. 698.

[6] Mutual Benefit Life Ins. Co. v. Hotterhoff, 2 Cin. Sup. Ct.

ting drunk.[1] We fancy, however, the courts would not hold the converse of this.

A "saloon-keeper" is one who retails cigars, liquors *et hoc genus omne.*[2]

A "keeper" of a place for the unlawful sale of liquor is not only the owner thereof, but any one who is in possession and control of the place and liquors, and managing the business.[3]

In England, one who on Sunday walked to a spa two and a half miles away from his home for the purpose of drinking the mineral water for the benefit of his health, and then took some ale at an hotel (to keep the water down we suppose) was held by the Court of Common Pleas to be a "traveler."[4] England is a small country; one cannot go far in any direction there without getting his feet damp, like Knute and his friends. We presume this is why what would here be called "taking a stroll," is there dignified by the name of "traveling."

In considering the question of selling liquor to a "minor," the court held that the fact that a youth wore a beard and said that he was twenty-one was no proof that he was an adult.[5] The bench doubtless believed that although every

[1] Mullinex v. People, 76 Ill. 211.
[2] Cahill v. Campbell, 105 Mass. 69.
[3] Schultz v. State, 32 Ohio St. 276.
[4] Pepler v. Richardson, L. R., 4 C. P. 168.
[5] Geltz v. State, 41 Ind. 162.

American boy may become president, still every one is not a George Washington; but that as Mark Twain says: "Some Americans will lie." As to beards, nature occasionally "bursts out with a chin-tuft" before her time, or where she should not.

On a trial for this offence (not of nature, but of selling to a minor) a jury must not look at the personal appearance as to age of the alleged minor, and regard such inspection (either with or without other evidence of age) in determining whether or not the defendant acted in good faith in selling the liquor and believed that the boy was a man.[1] But a reasonable and honest belief on the part of the dramseller that the youth was of full age is a valid defence.[2]

If one sells, or delivers, intoxicating beverages to a minor for the use of his parents that is not within the meaning of the law forbidding the sale or delivery of intoxicating liquors to "minors;" at least not in Massachusetts. For the mischief which the law is intended to prevent is, the possession of intoxicants by a minor for his own use and under his own control, and the case must fall strictly within the words of the statute to sustain an action or prosecution.[3]

[1] Kiniger v. State, 53 Ind. 251.

[2] Robinson v. State, 63 Ind. 235.

[3] Com. v. Lattenville, 120 Mass. 385; but see Ross v. People, 17 Hun, 591.

A youth ceases to be a "minor" at one second past midnight on the morning preceding the twenty-first anniversary of his natal day; the law does not recognize parts of a day; De minimis non curat lex.[1]

Bergen walked up to Burnham's bar in Massachusetts, accompanied by two minors, and called for drinks for the three. Each of the boys named his liquor, and having received it, took it without winking (at least the reporter does not say they did). Bergen paid for the whole party. On proceedings being taken against the defendant, Burnham, for selling liquor to minors, the court held that he had not done so; that the sale was to the man Bergen, and that the fact of the boys choosing their own drinks, and receiving them direct from the barkeeper, did not alter the transaction.[2]

Judges do not exactly know — at least when on the bench — what a "saloon" is. They say that it does not necessarily import a place to sell liquors; that it may mean a place for the sale of general refreshments,[3] or that it may mean a room for the reception of company, or for an exhibition of works of art, etc.[4] (This latter idea shows how high-toned Texan judges are, and that

[1] Parsons on Contracts, vol. I, p. 294.
[2] St. Goddard v. Burnham, 124 Mass. 578.
[3] Kitson v. Mayor of Ann Arbor, 26 Mich. 325.
[4] State v. Mansker, 36 Tex. 364.

they have traveled in foreign parts.) Neither an inclosed park of four acres in extent, nor an uninclosed and uncovered platform, erected for the votaries of the Terpsichorean art, and where lager beer is sold, can rightly be considered a "saloon," or a "house," or "building," within the meaning of the Connecticut statute, forbidding Sunday selling of intoxicating liquors, etc.[1] We opine that the Texan court would have held both this park and platform a "saloon," as there would certainly be "room for the reception of company," and if the dancing was good, and the dresses of any Worth, there would be an exhibition of works of art as well.

A "cellar" may be referred to as the abovementioned house.[2] In England it was held that a covenant not to use a house as a "beer-house," was not broken by the sale, under a license, of beer, by retail, to be consumed off the premises.[3] One Schofield had a license to sell beer "not to be drunk on the premises." The bartender handed a mug of beer through an open window in Schofield's house to a thirsty soul, who paid for it, and immediately drank it standing on the Queen's highway, but as close as possible to the window. The Court of Queen's Bench considered that this

[1] State v. Barr, 39 Conn. 41.
[2] Com. v. Intoxicating Liquors, 105 Mass. 181.
[3] L. & N. W. Railway v. Garnett, L. R., 9 Ex. 26.

was not a case of selling beer "to be consumed on the premises."[1]

If one becomes "gloriously drunk," as the poet Cowper says, "across the walnuts and the wine" (to quote Tennyson) at a social party held at the house of a friend, he cannot be prosecuted for being intoxicated in a public place.[2] Nor would he be liable if found drunk in his own house.[3]

A tavernkeeper found drunk at half-past eleven o'clock at night in his own house, after his premises have been closed for the night, cannot be punished for being found drunk on "licensed premises;" for such words must mean premises open to the public during licensed hours, or during the time when the premises are a *quasi* public place. Mr. Justice Mellor thought that to hold him liable for being drunk in the privacy of his own chamber would produce the most singular consequences.[4] An innkeeper drunk on his own premises, while they are open, is as much amenable to the penalty of being found drunk in a "public place," as if found upon the highway.[5]

[1] Deal v. Schofield, L. R., 3 Q. B. 8.

[2] State v. Sowers, 52 Ind. 311; State v. Waggoner, id. 481.

[3] Reg. v. Blake, 6 Pr. Rep. (Ont.) 244; Lester v. Torrens, L. R., 2 Q. B. Div. 403.

[4] Lester v. Torrens, *supra*.

[5] Idem per LUSH, J.; but see Cole v. Coulton, 29 L. J., M. C. 125.

In Yorkshire, once upon a time, a policeman, going up stairs in a tavern, found the landlord — who believed as the poet sang —

> He who goes to bed, and goes to bed sober,
> Falls as the leaves do, and dies in October;
> But he who goes to bed, and goes to bed mellow,
> Lives as he ought to do, and dies an honest fellow.

drunk, and hauled him before the magistrates, and they fined him for being drunk in a public place. Alas for the maxim, Domus sua quique est tutissimum refugium.[1]

A "public place" is any place to which the public have admission free of charge; or any place which, though not open to the public without payment, is still public to all who are willing to pay certain charges, such as railways, omnibuses, and so forth.[2] But theaters and other places where the proprietors have a right to refuse admission to the *profanum vulgus* notwithstanding their willingness to pay, are not public places.[3] A "beer-house" is a public house where beer is sold to be drank upon the premises; a "beer-shop" is a place where beer is sold to be drank off the premises, or, perhaps, it does not

[1] Wharton on Innkeepers, p. 81.

[2] *Ex parte* Davis, 26 L. J., M. C. 178; Re Fortescue, 25 L. J., M. C. 121; R. v. Holmes, 22 L. J., M. C. 122; Sewell v. Taylor, 29 L. J., M. C. 50.

[3] Wharton on Innkeepers, 70; 22 A. L. J. 24.

matter whether it is consumed on the premises or not.[1]

The phrase "spirituous liquors" does not include "fermented liquors."[2] "Ale," being produced by fermentation and not distillation, has been held to be not "spirituous liquor."[3] "Ale and beer," which differ from each other by the latter containing more hops than the former, are both intoxicating liquors, and are also considered "strong and spirituous liquors."[4] WALWORTH, chancellor, says, in his elaborate, learned and interesting opinion in this last case: "That the words 'strong liquors,' in the New York statutes, were probably intended to include all those strong and inebriating drinks sold and used as beverages which, in King James' version of the Scriptures, are called 'strong drink,' as well as the product of the still. It will be seen," said the chancellor, "by a reference to the French translation of the Bible, that the Hebrew word, which is supposed to mean any kind of fermented intoxicating beverage, and which in our English version is called 'strong drink,' is, in the French translation, generally

[1] Bishop of St. Albans v. Battersby, L. R. 3 Q. B. D. 359; London, etc., v. Field, L. R., 16 Chy. D. 645; Holt v. Collyer, id. 718.

[2] State v. Adams, 51 N. H. 568; State v. Moore, 5 Blackf. 118.

[3] People v. Culley, 20 Barb. 248; State v. Moore, 5 Blackf. 118.

[4] Nevin v. Ladue, 3 Denio, 407.

rendered *cervoise*. And that is the proper French word to designate the ale or beer of the ancients produced by the fermentation of grain in water. The Hebrew word used in the Scriptures could not have meant distilled or ardent spirits, for the art of distillation was not known to the ancients, but is supposed to have been discovered several hundred years after the Christian era. But the intoxicating beverage now known as ale or beer, produced by fermentation of barley, wheat and other farinaceous substances, must have been used by the Jews at a very early day, as it was by other Eastern nations. Its use as a beverage was probably known to them while they sojourned in the land of Ham, and before the Pentateuch was written. For beer was in use in Egypt from the most remote antiquity. The learned President De Gorquet, in his valuable treatise on the origin and progress of laws, and of the arts, among the most ancient nations, says: 'That next to wine, it was the most ancient and universal liquor. It was the common drink of the greatest part of Egypt, and its invention is exceedingly ancient.' And the discovery of the art of making it (as stated by Diodorus Siculus) was there ascribed to Osiris, who was the Bacchus of the Egyptians. And as the vine did not flourish in Egypt (at least according to Herodotus) it probably was *oinos kristhinos*, or barley wine, that Joseph gave to his brethren on their

second visit to that country to buy corn, when they drank largely and became intoxicated, as the Hebrew text clearly indicates, or, in the language of our translation, "drank and were merry."[1]

"Ale, beer, porter, rum, gin, brandy, whisky and wine," are, in Missouri, all held to be "intoxicating liquors."[2] But in Rhode Island there is no presumption that "beer" is a malt liquor.[3]

The Alabama court knows what "lager bier" is. When considering the question as to whether it is a malt liquor or not, the court remarked: "It is most unquestionable that courts will take notice of what is within the common experience and knowledge of all men. Lager bier is certainly universally known here as a malt liquor; and it would be as vain and useless to offer evidence that such is its character, as that whisky is a distillation of grain, or wine the fermented juice of the grape, or cider the expressed juice of the apple. * * * From its introduction into this country as a beverage, that it is a malt liquor is known wherever it is drunk or is an article of commerce. Courts cannot profess ignorance of the meaning of words of popular use, and about the signification of which no in-

[1] Nevin v. Ladue, *supra*.
[2] State v. Wittman, 12 Mo. 407.
[3] State v. Beswick, 13 R. I.

telligent member of the community could hesitate."[1]

In many of the States "lager bier" is by statute included in the term "intoxicating liquor;" however mild it may be in reality, the legislators of Maine, Massachusetts and other States hold that it is intoxicating, and it is dealt with in such places accordingly.

"Lager bier" is recognized in the Rhode Island statutes as a malt liquor, and so the courts can assume that it is such without actual proof of the fact.[2] Evidence of keeping and selling "lager bier," it being a malt and intoxicating liquor, is sufficient to sustain a criminal complaint for keeping ale, wine, rum, and other strong and malt liquors.[3]

"Spruce beer, spring beer, ginger beer, and molasses beer," may each and all be properly termed "fermented beer," as fermentation to a certain extent is necessary to fit these mild drinks for use. But none of these are ever considered "strong drinks or intoxicating beverages," either in America or England, and they are, therefore, not excisable articles. They all contain a certain amount of alcohol. They have not been considered strong drinks or intoxicat-

[1] Watson v. State, 55 Ala. 158.

[2] State v. Goyette, 11 R. I. 592.

[3] State v. Campbell, 18 A. L. J. 397; Rhode Island v. Rush, 13 R. I.

ing beverages, either because it was supposed that the human stomach had not the capacity to contain a sufficient quantity of such kinds of beer (if they were properly made) to unduly or injuriously excite the person who used them as a beverage; or for the reason that those who were in the habit of using them never got intoxicated by such use. So says Chancellor WALWORTH.[1]

"Wine" is included under the term "intoxicating liquors;" unless, indeed, in Iowa it is manufactured from grapes, currants or fruits grown in the State.[2] In North Carolina it has been held that the intoxicating quality of port wine is a matter of common knowledge, and no proof need be given to a jury of that fact.[3]

"Drink or medicine?" That is often a question, and the court in Iowa has said, so long as liquors retain their character as intoxicating liquors, capable of use as beverages, notwithstanding that other ingredients — roots or tinctures — may have been mixed therewith, they fall under the ban of the law, and are still considered intoxicating liquors; but when they are so compounded with other substances as to lose their distinctive characters of intoxicating liquors, and are no longer desirable for use as

[1] Nevin v. Ladue, *supra*.

[2] Worley v. Spurgeon, 38 Iowa, 465; State v. Stapp, 29 id. 551.

[3] State v. Packer, 80 N. C. 439.

stimulating beverages, then they are medicine, and their sale is not prohibited.[1]

"Cider" is not a vinous liquor.[2] This seems reasonable enough in view of the decision that "vinous liquors" mean liquors made from the juice of the grape.[3]

A "dram," in common parlance in Texas, means something that has alcohol in it; something that can intoxicate. At least so say the judges.[4] Even calling an article by the innocent name of "pop" will not make it a temperance drink, if it contains malt liquor and will intoxicate if taken in sufficient quantity.[5]

Some years ago, in Indiana, they were very virtuous, and the court decided that the mere opinion of a witness that common "brewers' beer" was intoxicating was not sufficient to prove that it was so, unless the testimony of the witness was founded on a personal knowledge of its effects, or of its ingredients or mode of manufacture, and that the court could not take judicial notice that it was intoxicating.[6] But alas for the good old days and childlike innocence of judges and jurymen! Now both courts and

[1] State v. Laffer, 38 Iowa, 422; Com. v. Ramsdell, 23 Alb. Law Jour. 514.

[2] Feldman v. Morrison, 1 Ill. App. 469.

[3] Adler v. State, 55 Ala. 16.

[4] Lacy v. State, 32 Tex. 227.

[5] Godfreidson v. People, 88 Ill. 284.

[6] Glare v. State, 43 Ind. 483.

juries in that State know judicially and officially that "whisky" is an intoxicating drink without any proof.[1] In fact the decisions appear to have been a little mixed in that State. In one case, some time ago, the court said that it did not judicially know that wine was intoxicating,[2] and yet about the same time it took notice of the fact that spirituous liquors were intoxicating.[3] Perhaps the spirits then were not so mixed as the wine.

We must do jurymen the credit of believing that they have an acquaintance with ordinary terms and allusions, whether historical, or figurative or parabolical. At least Judge COLERIDGE said so. And what is "malt liquor" is a question of fact for the jury to decide, and not one of law for the judge.[4] Where a statute speaks of "intoxicating liquors," and it is shown that lager bier was sold, it is for the jury to say — from the evidence, of course — whether it is intoxicating or not.[5]

In Massachusetts a jury was held warranted in finding "ale" to be intoxicating, merely on the testimony of a witness who saw and smelled, but

[1] Eagen v. State, 53 Ind. 162.,

[2] Jackson v. State, 19 Ind. 312.

[3] Carmen v. State, 18 Ind. 450; Com. v. Peckham, 2 Gray, 485.

[4] State v. Starr, 67 Me. 242.

[5] Ran v. People, 63 N. Y. 277.

did not taste it.[1] Perhaps these twelve men, good and true, had had a view themselves. In Maine one may be indicted and convicted for selling, for tippling purposes, "cider and wine," although made from fruit grown in the State, if the jury find that they are intoxicating.[2] How much and how long would it take the jury to find this out? Would they be allowed to take specimens with them into their withdrawing room as they do documents, to examine? Or would the judge look upon cider and native wine as Mr. Justice CRESWELL did upon water? A counsel once objected to a jury having water while considering their verdict. "Why not, Mr. ——, why not?" queried the judge, "Water is neither 'meat' nor 'fire,' and no sane man can say it is 'drink;' let the jury have as much as they want."

"Is Old Tom Gin 'spirits?'" This was the question which the Court of Queen's Bench in Ontario had to decide upon one occasion. Witnesses and dictionaries were called in to the assistance of the court. Some witnesses thought spirits meant pure, unflavored spirits; another thought that spirits lost their character as such if mixed with any thing else, that then they became a cordial. The general notion was that Old Tom

[1] Haines v. Hanrahan, 105 Mass. 480.
[2] State v. Page, 66 Me. 418

Gin being a compound of spirits, sugar and flavoring matter, it was no longer spirits. The dictionaries, however, were appealed to on the subject of gin. Worcester said, "it is a kind of ardent spirits originally manufactured in Holland from rye and malted bigg (barley), and flavored with juniper berries." The Encyclopædia Britannica described it "as a kind of malt spirit flavored with the essential oil of juniper. The inferior spirit sold as gin is said to be flavored with turpentine, and rendered biting to the palate by caustic potash." McCulloch and Webster both class "gin" among "spirits." The judge could not see that the admixture of sugar, with some flavoring essence to make it more agreeable to the taste, could deprive Old Tom Gin of its general character, any more than the mixing of spirits with water to reduce its strength; nor did he think that the giving a name or prefix, such as Old Tom, to any one of the various drinking beverages coming within the term "spirits," freed it from the generic appellation; on the whole he was clearly of the opinion that Old Tom Gin came within the generic appellation of spirits; to hold otherwise he considered would be contrary to the fair and ordinary understanding of the term, and a mere trifling with words.[1]

[1] Winning v. Gow, 32 U. C. R. 528.

In deciding what are or what are not "spirits," under excise acts, in the absence of any statutable definition, the rule is to assume that the word in question is used in the sense in which it is ordinarily understood. And nothing can be taken to be "spirits" which does not come within the definition of an inflammable liquid produced by distillation; either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the general appellation of "spirits." "Sweet spirits of nitre" (we have it upon the authority of no less a judge than Baron ROLFE) are not adapted for ordinary use as an intoxicating beverage; nor are they "spirits" within the meaning of the excise acts.[1]

"Spirits" do not cease to be spirits because mixed with small quantities of water.[2]

The "Sabbath night" includes as well the time between midnight on Saturday and daylight on Sunday as the time between dark on Sunday and midnight.[3] When a tavern is ordered to be closed on Sunday, the law means that sales of liquor shall be entirely stopped and traffic shut off effectually, so that neither drinking nor the conveniences of drinking shall be accessible to the

[1] Attorney-General v. Bailey, 1 Ex. 292.
[2] Scott v. Gilmore, 3 Taunt. 226.
[3] Kroer v. People, 78 Ill. 294.

public.[1] If the law says that bar-rooms are to be shut during certain hours, it is not obeyed by the restaurant-keeper merely abstaining from selling and hanging a curtain in front of his bar, if the room is still open.[2] But simply opening the bar does not constitute the offence, unless it is open as it is on week days.[3] A single glass sold, if at the time the room is accessible to the public, is sufficient to render one guilty of keeping open a tippling-house on Sunday.[4] Hyneman, when accused of selling liquor on the Lord's day, tried to escape by saying that he was of the seed of Abraham, and that he conscientiously believed that the seventh day should be observed as the Sabbath, and not the first. But it was of no use.[5]

As to the mode of selling, RICHARDS, C. J., thought that selling "a bottle of brandy" for $1.25 was selling by retail;[6] and in another case Chief Justice HAGERTY said that he would assume that a sale of a "bottle of gin" at sixty cents was a sale by retail.[7] While in Illinois the court held that proof that intoxicating liquors were retailed

[1] Kurtz v. People, 32 Mich. 279.
[2] Baldwin v. Chicago, 68 Ill. 418.
[3] Patten v. Centralia, 47 Ill. 370
[4] Koop v. People, 47 Ill. 327.
[5] Com. v. Hyneman, 101 Mass. 30.
[6] Reg. v. Durham, 35 U. C. R. 508.
[7] Reg. v. Strachan, 20 C. P. (Ont.) 184.

"by the drink" warranted a finding that the sale was in "no larger quantity than a quart" (as restricted in the Ill. Rev. Stat. 1845).[1] The judges of the court clearly never heard of the Duke of Tenterbelly. Bishop Hall tells us that this famous nobleman, when returning thanks for his election, took up his large goblet of twelve quarts, exclaiming should he be false to their laws "Let never this goodly formed goblet of wine go jovially through me;" and then, says the historian, "he set it to his mouth, stole it off every drop, save a little remainder, which he was by custom to set upon his thumb's nail and lick it off, as he did." The sale of a single glass was held sufficient to convict a man of selling intoxicating liquor in less quantities than a quart.[2] If one sells an occasional drink of spirits out of a bottle not in a bar-room, and without having the slightest intention of delaying the payment of the National debt by defrauding the National revenue, he cannot be said to be carrying on the business of a retail liquor dealer.[3]

Some wise men down East being desirous of promoting social and literary objects, as they said, formed an unincorporated club and so arranged matters that they could get beer in their club-house whenever they chose, giving

[1] Lappington v. Carter, 67 Ill. 482.
[2] Kansas City v. Muhlback, 68 Mo. 638.
[3] U. S. v. Jackson, 1 Hugh. 531.

checks in exchange for glasses of it; they objected to being considered dealers in beer, or to paying revenue taxes; but the court decided against them on both points.[1] In Illinois some gentlemen had a most elaborate plan for obtaining drinks. They formed an association for the avowed purpose of promoting temperance, friendship, etc. One of the party was already the happy possessor of a dram shop, they bought him out, elected him to the honorable position of treasurer, and left him in charge of his old shop. So anxious were the promoters to extend the benign benefits of temperance and friendship that the doors of their society were thrown open to any and all who were willing to pay one dollar. In token of payment the member received a ticket upon which were the numbers from one to twenty, inclusive. When moved by one of the

> reasons why men drink;
> Good wine, a friend, because I 'm dry,
> Or lest I should be by and bye,
> Or any other reason why;

the member called upon the treasurer, presented his ticket, had a number punched, and received his liquor or his cigar. The treasurer took all the money, gave no account to the others and bought all the drinkables and smokables. The court was so bigoted, narrow minded and opposed

[1] U. S. v. Wittig, 2 Low, 466.

to the enlightening influence of temperance and friendship that it considered the whole affair a fraud and a device to evade the law; and that the treasurer was guilty of unlawfully selling intoxicating liquor.[1] In one establishment, whenever a customer purchased a cigarette he was handsomely treated to a glass of whisky, the court (knowing, perhaps from personal experience, the cost of such articles, or having had evidence submitted) considered that the transaction was a sale of the whisky as well as of the cigarette and acted accordingly.[2] In Alabama the court will not convict one of a breach of a penal statute when he does an act which merely contravenes it. Young got a dollar from B. (whom he knew to be an intemperate man) upon the promise that he should have the balance remaining after paying for a bottle of whisky; he bought a bottle, delivered it to B. And the court held that he had neither sold nor given away the liquor.[3]

A man may be a fit person to be intrusted with the sale of intoxicating liquor "in Indiana although he has been drunk once and takes a drink sometimes. A whisky seller need not be a teetotaler.[4] To "revel" in Rhode Island means

[1] Rickart v. People, 79 Ill. 85.
[2] Archer v. State, 45 Ind. 33.
[3] Young v. State, 58 Ala. 358.
[4] Calder v. Shephard, 61 Ind. 219.

to behave in a noisy, boisterous manner like a bacchanal,[1] and has nothing to do with the revels or solemn dances which were held in the Inns of Court in the good old days of yore. Those splendid old inns where good ale was so abundant that when, in 1678, the Inner Temple was in flames, and the Thames so fast frozen that no water could be got, the beer in the benchers' cellars was emptied into the engines and the flames subdued.

[1] Petition of Began, 12 R I. 309.

CHAPTER V.

CONTRACTS.

POTHIER defines a contract to be "an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do, or abstain from doing, some particular act."

Blackstone says, "A contract is an agreement, upon sufficient consideration, to do, or not to do, a particular thing,"[1] while Parsons, the leading writer on the subject in America, defines it as "an agreement between two or more parties for the doing or not doing of some particular thing."[2] And "agreement," said Sergeant Bollard,[3] "is derived from the phrase *aggregatio mentium*." The learned sergeant's philology was probably not in advance of his day and may be considered doubtful, but his law was sound, as the consent and harmony of the minds of the contracting parties is essential to the validity of an agreement. There must be a full and free consent.[4]

[1] 2 Com. 446.
[2] Parsons on Contracts, I, p. 6.
[3] Arguendo in Renigero v. Fogosra, Plowd., 17.
[4] Story's Eq. Jur., § 222.

Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good and evil on each side. And, therefore, it has been well remarked by an able commentator upon the law of Nature and Nations, that every true consent supposes three things: firstly, a physical power; secondly, a moral power; and thirdly, a serious and free use of those powers. And Grotius has added, that what is not done with a deliberate mind does not come under the class of perfect obligations. And hence it is, that if consent is obtained by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. For although the law will not generally examine into the wisdom or prudence of men in disposing of their property or in binding themselves by contracts or by other acts, yet it will not suffer them to be entrapped by the fraudulent contrivances, or cunning or deceitful management of those who purposely mislead them.[1]

It is upon this general ground, that a rational and deliberate consent is wanting, that the contracts and other acts of persons *non compotes mentis* are generally deemed to be invalid, especially in courts of equity. Grotius has, as

[1] Story, *supra*.

Story says, with great propriety insisted that this is a part of the law of nature, for (says he) the use of reason is the first requisite to constitute the obligation of a promise, which idiots, madmen and infants are consequently incapable of making. And long before his day Justinian laid it down that a madman could do no business, because he does not understand what he does. And Bracton and Fleta, those sages of the English common law, use language to the same effect.

In general every person may enter into contracts; and when the contract is made the law presumes the competency of the parties to it; but of course the presumption may be rebutted, and if one rests his action or his defence upon the incompetency or incapacity of himself or the other party he must prove it.[1]

Lord Coke mentions four different classes of persons who, in the eye of the law, are *non compotes mentis*, and so, as a rule, unable to bind themselves by contracts or promises. The first is an idiot or fool-natural; the second, is he who was of good and sound memory, and by the visitation of God has lost it; the third is a lunatic, *lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory and sometimes *non compos mentis;* and the fourth,

[1] Jeune v. Ward, 2 Stark. 326.

is a *non compos mentis* by his own act, as a drunkard.[1]

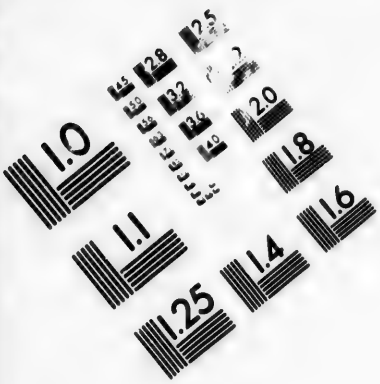
The common-law lawyers long insisted, in defiance of natural justice and the universal practice of all the civilized nations of the world, as Fonblanque says,[2] upon the maxim that no man of full age should be allowed to stultify himself — that no one could avoid his act or his contract by showing that he was intoxicated when he entered into it, and that a court of equity could not relieve against a maxim of the common law, *nul prendra advantage de son tort demesne.*

And, indeed, it must be admitted that the drunkard has less ground for avoiding his own acts and contracts than any other *non compos mentis.*[3] At common law, a distinction was made between the party himself and his heirs, executors or administrators; the latter, after the death of the insane person, might avoid his contract or other acts upon the ground of his insanity, while he himself was powerless to do so. Story remarks: "How so absurd and mischievous a maxim could have found its way into any system of jurisprudence professing to act upon civilized beings is a matter of wonder and humiliation. There have been many struggles against it by eminent lawyers in all ages of the common law,

[1] Co. Litt. 247 a.

[2] 1 Eq. B. 1, ch. 2, § 1.

[3] 3 Bac. Abr., Idiots and Lunatics, A.



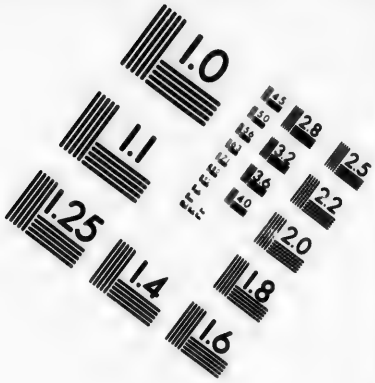
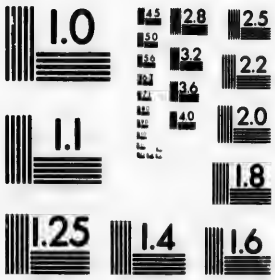
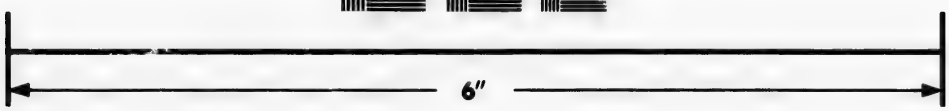
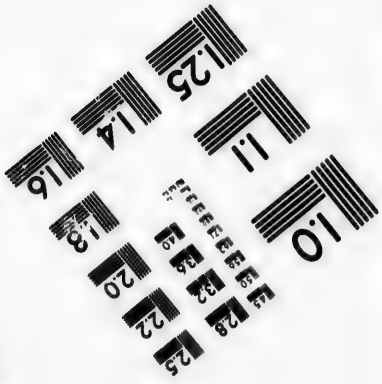


IMAGE EVALUATION TEST TARGET (MT-3)

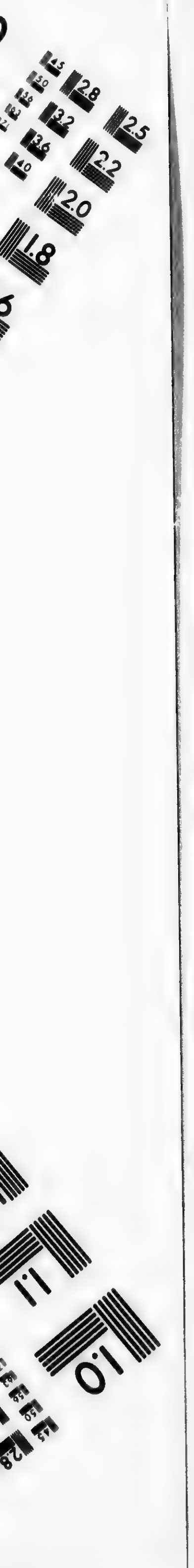






Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503



but it is, perhaps, somewhat difficult to resist the authorities which assert its establishment in the fundamentals of the common law,[1] a circumstance which may well abate the boast, so often and so rashly made, that the common law is the perfection of human reason.[2]

It is doubtful whether this maxim has ever been recognized as binding in any of the courts of common law in the United States; and in modern times the English judges seem to be disposed as far as possible to escape from it.[3]

The true and only rational exposition of the maxim, and the one which has been adopted by courts of equity, is that the maxim is to be understood of acts done by the lunatic in prejudice of others, as to which he shall not be permitted to excuse himself from civil responsibility on the pretence of lunacy, and is not to be understood of acts done to the prejudice of himself, for this could have no foundation in reason and natural justice.[4]

It is upon the ground of fraud that courts of equity now interfere to set aside the contracts and other acts, however solemn, of all who are *non compotes mentis*, those "who have tarried

[1] 3 Bl. Com. 291, 292; Baxter v. Portsmouth, 5 B. & C. 170; Brown v. Toddrel, 3 C. & P. 30

[2] Story, § 225.

[3] Baxter v. Portsmouth, 5 B. & C. 170.

[4] Story, § 226.

long at the wine" included. Such unhappy ones being incapable, from want of capacity, of entering into any valid contract or doing any valid act, everybody dealing with them knowing their incapacity is deemed, by equity — the soul and spirit of all law — to perpetrate a meditated fraud upon them and their rights. Even courts of law, quickened and softened by the advance of ages, now lend an indulgent ear to cases of defence against contracts of this nature, and if the fraud is made out will declare them invalid.[1]

What fraud is, the courts have very wisely never laid down as a general proposition, nor have they ever declared any general rule beyond which they will not go, lest, as Lord HARDWICKE says, "the fertility of man's invention would contrive some way of eluding the rules by new schemes." It will, however, answer every purpose if this Protean vice is understood to be any act, omission or concealment which involves a breach of a legal or equitable duty, trust, or confidence justly reposed, and is injurious to another, or by which an undue and unconscientious advantage is taken of another.[2]

One who allows himself to be deprived of his reason by strong drink has little claim upon the consideration of the courts, has but slight cause to ask for relief against acts done and contracts

[1] Story, § 227. [2] Story, § 187.

made by him; yet courts of equity will relieve him from the effects of his acts performed while thus temporarily insane, where they have been procured by the fraud or imposition of the other party. For whatever may be the demerit of the drunkard himself, the other party has not the slightest ground for claiming the protection or assistance of courts of equity against or to further his own grossly immoral and fraudulent conduct;[1] for he comes not into court with those clean hands in which equity so much delighteth; fraud has made his hands more foul than are those of the man who has stumbled through strong drink.

It was held in Vermont that whenever a man loses his memory and understanding he is entitled to legal protection, whether such loss is occasioned by his own imprudence or misconduct or by the act of Providence.[2] But to set aside any act in court on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must arise to that degree which may be called excessive drunkenness, where the party is entirely deprived of the use of his reason and understanding. In such a case there can, in no just sense, be said to be serious and deliberate consent on his part, and without this no contract or other act can or ought to be binding by the law of nature.

[1] Story, §§ 230, 231. [2] Bliss v. Railroad, 24 Vt. 424.

If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all; unless there has been some contrivance or arrangement to draw the party into drink,[1] or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him; then it is the duty, yes privilege, of a court of equity to defeat a fraud practised on a man whose mind is weakened or darkened by intemperance. And the reason of this rule is very obvious, for the fact that a contract has been entered into gives a presumption that the parties were in a condition to consent; if, however, this presumption is rebutted, and it appears that the person was in a state of complete intoxication, the law will hold that he was incompetent to enter into a contract.[2] As Sir WILLIAM GRANT, M. R., remarked, "A court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand, ought not to assist a person to get rid of any agreement or deed merely on the ground of his having been intoxicated at the time. I say merely upon that ground; as if there was, as Lord HARDWICKE expresses it in *Cory* v. *Cory*,[3] 'any unfair advantage made of

[1] Hotchkiss v. Fortson, 7 Yerg. 67; Harvey v. Peaks, 1 Munf. 519; Croppen v Ogilvie, 8 Ch. (Ont.) 253.

[2] Menkins v. Lightner, 18 Ill. 283.

[3] 1 Ves. 19.

his situation;' or as Sir JOSEPH JEKYLL says, in *Johnson* v. *Meddlecott*,[1] 'any contrivance or management to draw him into drink,' he might be a proper object of relief in a court of equity. As to that extreme state of intoxication which deprives a man of his reason, I apprehend, that even at law it would invalidate a deed obtained from him while in that condition."[2]

One may successfully avoid his contract if he proves that when he entered into it he was in such a state as not to know what he was doing,[3] or unable to contract intelligently.[4] One who was under the influence of strong drink only to such an extent that he did not clearly understand the business he was attempting to transact, and no advantage was taken of his excited state, cannot treat his agreement as either void or voidable;[5] nor can a man who remembered his act, and the accompanying circumstances on the following morning, repudiate his promissory note made when intoxicated, if it is in the hands of a *bonâ fide* holder.[6]

Although from *Sentance* v. *Poole*,[7] it might be

[1] 3 P. Wms. 130, note *a*.

[2] Cooke v. Clayworth, 18 Ves. 12; see, also, Nagle v. Baylor, 3 Drury & W. 64; Sugd. V. & P., ch. 4, § 3.

[3] Johns v. Fitchey, 39 Md. 258.

[4] Phelan v. Gardner, 43 Cal. 306.

[5] Henry v. Retinour, 31 Ind. 136.

[6] Caulkins v. Fry, 35 Conn. 170.

[7] 3 C. & P. 1.

inferred that an indorsement made in a state of complete intoxication could not be enforced against the drunkard by a *bonâ fide* holder without knowledge of the circumstances, such a rule must rest on the assumption that the act was a *nullity;* but as Parsons says: "It is difficult to see how one could indorse a bill, or a note, in such a way that its appearance would excite no suspicion, and yet be so drunk as to know nothing of what he was doing; and unless the indorser was utterly incapacitated, it should seem that a third party taking the note innocently and for value ought to hold it against him.[1] Byles lays it down positively, that total drunkenness producing complete, though temporary suspension of reason, is, of itself, a defence to an action, at least to one by a person who has notice.[2] "It is just the same," says ALDERSON, B., "as if the maker had written his name on the bill in his sleep in a state of somnambulism."[3] In Pennsylvania it has been held that the drunkenness of the maker of a note cannot be set up as a defence against an innocent holder for value.[4]

Sometimes equity has indirectly, by refusing relief, sustained agreements which have been

[1] Parsons on Contracts, vol. I, 384; Miller v. Finley, 12 Am. Rep. 306; Caulkins v. Fry, 35 Conn. 170.

[2] Molton v. Camroux, 2 Ex. 487; 4 id. 17; Byles, 48.

[3] Gore v. Gibson, 13 M. & W. 623.

[4] State Bank v. McCoy, 69 Penn. St. 204.

fairly entered into, although the party was intoxicated at the time;[1] and especially they have refused relief when the agreement was to settle a family dispute, and was in itself reasonable.[2] In fact it would appear that a reasonable family compromise may be enforced against one who was drunk when he entered into it; so greatly are such agreements favored by equity.[3]

Lord ELLENBOROUGH held that an agreement made by an intoxicated man is void.[4] Parsons, although some of the authorities may seem to be inconsistent with this principle, says it nevertheless seems to be the true one.[5] English writers, however, appear to consider such a contract as voidable, not void.[6]

The settlement of a cause of action, made when one of the parties was so intoxicated as to be incapable of understanding it, will not be binding upon him.

The plea of intemperance can be used only as a weapon of defence, not one of attack; one

[1] Cook v. Clayworth, 18 Ves. 12; see, also, 5 Barn. & C. 170.

[2] Cory v. Cory, 1 Ves. 19.

[3] ELDON, Ch., Stockley v. Stockley, 1 Ves. & B. 21.

[4] Pitt v. Smith, 3 Camp. 33; Fenton v. Halloway, 1 Stark. 126

[5] Parsons on Contracts, vol. I, 385.

[6] Pollock on Contracts, 76; Roblin v. Roblin, 28 Grant, 445.

cannot take advantage of his intoxication, so as to cheat others. If one made himself drunk with the intention of avoiding a contract entered into by him while in that state, it may well be doubted whether he would be permitted to carry this fraud into effect. If one buys goods when drunken, but keeps them when sober, his drunkenness is no answer to an action for the purchase-money.[1] The intoxication renders the contract not void but voidable only, and to avail as a defence the agreement must have been rescinded by restoring whatever was received as the consideration therefor.[2] But if the action is not for goods sold, but on a written instrument given to secure the payment thereof, intoxication may be a good defence, even though the defendant kept and used the goods.[3]

A distinction has been taken between express contracts and those implied by law, as for money paid, goods sold, etc. When the right of action is grounded upon a specific, distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case POLLOCK, C. B., contends, there can be no binding contract; but in many cases the law does not require an actual agreement between the parties,

[1] Gore v. Gibson, 13 M. & W. 623; Parsons, I, 385.

[2] Joest v. Williams, 42 Ind. 565; but see Barkeley v. Cannon, 4 Richardson, 136.

[3] Reinskoff v. Rogge, 37 Ind. 209.

but implies a contract from the circumstances: in fact, the law itself makes the contract for the parties. Thus in actions for money had and received to the plaintiff's use, or money paid by him for the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So a tradesman, who supplies a drunken man with necessaries, may recover the price of them if the party keeps them when sober, although a count for goods bargained and sold would fail. ALDERSON, B., said, "A party, even in a state of complete drunkenness, may be liable in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessaries." [1]

Pollock, in his Principles of Contracts, says that three distinct theories with regard to the capacity of drunken men to contract have at different times been entertained in English courts and supported by respectable authority. The first is that the drunkenness, or lunacy, of the party is no ground whatever for avoiding the contract. This is confidently stated as law by Coke; Fitzherbert and Bracton, however, are opposed to it. The next theory is to the following effect: If a man is so drunk (or so insane) as not to know what he is about, he cannot have that consenting mind which is indispensable to the formation of

[1] Gore v. Gibson, 13 M. & W. 623.

a contract, and his agreement, is therefore, merely void. But if his mind is only so confused or weak that he cannot be said not to know what he is about, but yet is incapable of fully understanding the terms and effect of his contract, and if this is known to the other party, then he may indeed contract, but the contract will be voidable at his option; on the ground, not of his own incapacity, but of the other's fraud in taking advantage of his weakness, though such weakness be short of incapacity. This, Mr. Pollock considers, was doubtless a reaction against Coke's extravagant dogmas. This doctrine, he says, is quite intelligible, and in principle there is nothing to be said against it. But the distinction between inability to understand so much as the nature of a transaction (which would make it wholly void) and inability to form a free and natural judgment of its effect (which if known to the other party would make it only voidable) is too fine and doubtful to be convenient in practice. The third opinion, which has now prevailed, is that the contract of a lunatic or drunken man who, by reason of lunacy or drunkenness, is not capable of understanding its terms or forming a rational judgment of its effect on his interests, is not void but only voidable at his option; and this only if his state is known to the other party.

The way was prepared for this by decisions establishing an exception in the case of executed

contracts to the supposed rule of absolute nullity, which exception may be stated as follows:

When a contract has been entered into in good faith with a person of apparently sound mind who is not known to be otherwise, but who is in fact of unsound mind, and the contract has been performed so that the parties cannot be replaced in their original position, it cannot be set aside by the person of unsound mind, or his representatives.

This principle was long ago acted upon in equity, but without any decision as to the validity of the contract in law.[1] The judgment which fully settled it was that of the Exchequer Chamber in *Melton* v. *Camroux*.[2] The action was brought by administrators to recover the money paid by the intestate to an assurance and annuity society as the price of two annuities determinable with his life. The intestate was of unsound mind at the date of the purchase, but the transactions were fair and in the ordinary course of business, and his insanity was not known to the society. It was held that the money could not be recovered; the rule being laid down in the Exchequer Chamber more positively than in the court below, and in these terms: "The modern cases show that when that state of mind (lunacy

[1] Niell v. Morley, 9 Ves. 478.

[2] 2 Ex. 487; 4 id. 17; 18 L. J., Ex. 68, 356.

or drunkenness, even if such as to prevent a man from knowing what he is about) was unknown to the other contracting party, and no advantage was taken of the lunatic (or drunken man), the defence cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored altogether to their original positions."

The context shows that the statement was considered equally applicable to lunacy and drunkenness, and the law thus stated involves, though it does not expressly enounce, the proposition that the contract of a lunatic or drunken man is not void, but at most voidable. The general rules as to the rescission of a voidable contract are then applicable, and among others the rule that it must be rescinded, if at all, before it has been executed so that the former state of things cannot be restored; which is the point actually decided. The decision itself has been fully accepted and acted on both at law[1] and in equity,[2] though the merely voluntary acts of a lunatic, *e. g.*, a voluntary disentailing deed (a class of acts with which we are not here concerned), remain invalid.[3] It was also observed that the decision had an important bearing on the general

[1] Beavan v. McDonnell, 9 Ex. 809; 23 L. J., Ex. 94.

[2] Price v. Berrington, 3 Mac. & G. 486, 495, rev'g S. C., 7 Ha. 394; Elliott v. Ince, 7 D. M. & G. 475, 488.

[3] Elliot v. Ince, *supra.*

question whether "a conveyance executed (or a contract made) by a lunatic is absolutely void, in the absence of notice or fraud."[1] However the complete judicial interpretation of the result of *Molton* v. *Camroux* was not given till the recent case of *Matthews* v. *Baxter*.[2] The declaration was for breach of contract in not completing a purchase; plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of transacting business or knowing what he was about, as the plaintiff well knew; replication, that after the defendant became sober and able to transact business, he ratified and confirmed the contract.

As a merely void agreement cannot be ratified, this neatly raised the question whether the contract were void or only voidable; the court held unanimously (one member of it expressly on the authority of *Molton* v. *Camroux*) that it was only voidable, and the replication, therefore, good.[3]

[1] 8 Mac. & G. at p. 498.
[2] L. R., 8 Ex. 132.
[3] Pollock, Principles of Contract, 74 *et seq.*

CHAPTER VI.

DEEDS.

PROOF of particular acts of excessive drinking by a party executing a deed is not, it seems, sufficient ground for setting the instrument aside in a court of equity.[1] At common law, however, Lord ELLENBOROUGH said "that intoxication is such a temporary mental incapacity as is good evidence, upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise;"[2] that is to say, that drunkenness is a good defence at law to an action on a covenant.

It appears that drunkenness does not absolutely avoid the deed, but only renders it voidable. Thus it has been held that if one executes a deed when so intoxicated as to entitle him to repudiate it, he may ratify it when sober, in this way supplying the necessary element of consent and making it binding upon himself and his representatives.[3]

[1] Smith v. Downing, Ca. temp. Hardw. 90; Cory v. Cory, 1 Ves. 19.

[2] Pitt v. Smith, 3 Camp. N. P. 33.

[3] Willoughby v. Moulton, 47 N. H. 204; Eaton's Admrs. v. Perry, 29 Mo. 96; Barrett v. Buxton, 2 Ark. 167; Matthews v. Baxter, L. R., 8 Ex. 132.

As already stated, courts of equity are especially vigilant in protecting intemperate people from those who either draw them into drink or take advantage of them when they are in their cups. And a deed improperly obtained will be set aside at the instance either of the grantor himself, or of his representatives if he departs this life without having an opportunity of seeing the folly of his transactions.[1] But the intoxication must have been such as to have deprived the grantor of understanding.[2]

Dealings between tavern-keepers and persons given to intemperance concerning the property of the latter are especially scrutinized with the microscopic eyes for which equity is famous. A judge once remarked[3] that no one is more helpless than a drunkard is in the hands of those who obtain his confidence and to whom he looks day by day for the gratification of the morbid craving which has possessed him; and the modern doctrine of both law and equity is against giving up even a poor drunkard, or a drunkard's property, to the prey of the rapacious and unprincipled. A deed improvident in its terms, obtained by a tavern-keeper from a boarder who was greatly addicted to intemperance, cannot be maintained

[1] O'Connor v. Rempt, 29 N. J. Eq. 156.
[2] Johnson v. Phifer, 6 Neb 401.
[3] McGregor v. Boulton, 12 Grant (Ont.), 288.

in equity without proof, not only that the grantor was sober when he executed the deed and that he knew the nature of it, but, also, that the transaction was entered into by him without the influence of the publican and under competent independent advice.

In another case the judge remarked that, he understood the rule in equity to be that a conveyance by an intemperance man of all his property to a tavern-keeper, with whom he lives and at whose house he has been supplied with the drink which he prefers to all earthly objects of desire and to all hopes of future happiness, is subject to the same rules as a conveyance to a person occupying toward the grantor a relation of confidence or influence. The danger, as a protection against which these rules have been laid down, exists in a much larger degree in the former than in the latter case, and needs to be guarded against with greater caution. Here an old man, the slave of drink, executed deeds of all his property, real as well as personal, to the innkeeper with whom he boarded, and accepted in consideration therefor the bond of the latter, undertaking to support him the remainder of his life; a consideration wholly inadequate. Within five months after the transaction the poor drunkard died; naturally enough, his heirs were very much dissatisfied when they discovered the state of affairs, and they invoked the powerful aid of the

Court of Chancery, a machine akin to a Nasmyth's steam-hammer in some of its aspects, for it strikes ever with exquisitely graduated force, and nothing is too big and nothing too small for it to deal with. The court listened favorably to their application and set the deeds aside and ordered the costs to be paid by the rapacious publican.[1]

Again, an habitual drunkard of three score and two years executed, for a grossly inadequate consideration, a deed of certain land in trust for the keeper of the tavern with whom he resided and by whom he was supplied, *ad libitum*, with what the celebrated Robert Hall called "liquid fire and distilled damnation." Then the man made a will devising the same property to his brother, and then left for that country from "whose bourn no traveler returns." The court, at the instance of the devisee, set aside the conveyance and ordered the dispenser of strong drink to pay all the costs of the suit.[2] A man, who by habitual drunkenness had been reduced from the possession of a remarkably strong body and mind, and the respect of all who knew him, to a state of imbecility, made a deed of valuable property to an unnatural son who had been in the habit of supplying him with the liquid poison that degraded him below the level of the beast. The

[1] Hume v. Cook, 16 Grant (Ont.), 84.

[2] Clarkson v. Kitson, 4 Grant (Ont.), 244.

father afterward gave another deed to the wife of the same son. A bill was filed to set aside these gifts for fraud on the part of the son and incapacity on the part of the father; but, after the suit had gone on for some time, the son again obtained an improper influence over the old man's mind and secured from him a release of the action, without the intervention of any legal adviser to look after the interests of the father. The Court of Chancery, however, caused right to be done and justice to triumph by setting aside the conveyances and the release, with costs.[1]

On the other hand, where another victim of intemperance made a deed to his wife of his property, understanding fully what he was doing, though without having any professional advice, the court refused, at the request of the heir-at-law, to interfere. The judge considered that no advantage had been taken of the man's intemperate habits to procure the deed from him; besides he had no olive branches 'round about his table.[2] And where an old man of seventy-six years, who had become addicted to the use of intoxicating drinks, upon the eve of a second marriage, executed a deed in the nature of a testamentary disposition, the court refused to make a decree setting it aside, as there was no proof of

[1] Nevills v. Nevills, 6 Grant (Ont.), 121.

[2] Corrigan v. Corrigan, 15 Grant (Ont.), 341.

undue influence or of precipitancy of purpose, and the old man had shown practical judgment by reserving to himself, by the deed, absolute control of the property for his life.[1]

In one case, where a conveyance was given without consideration, and while the grantor was to the grantee's knowledge not himself, owing to intoxication, the court while setting aside the instrument did so without costs, and allowed the grantee taxes he had paid upon the property (with interest), as he had not connived at the drunkenness and had merely sought — being a relation — to save the property from being squandered.[2]

A bill was filed to obtain the specific performance of an agreement to purchase certain lands; the purchaser rued his bargain and showed, as a defence to the relief asked, that at the time he was induced to sign the agreement to purchase he was in a state of intoxication, and that the stipulated price for the lands was exorbitant. The court refused to compel him to carry out the contract.[3]

[1] Wiley v. Ewalt, 66 Ill. 26.
[2] Warnock v. Campbell, 25 N. J. Eq. 485.
[3] Schofield v. Tummonds, 6 Grant (Ont.), 568.

CHAPTER VII.

WILLS.

CAN a drunkard make a will? The general rule of law with regard to drunkenness and testamentary capacity is very similar to that which we have already discussed in connection with contracts.

Coke classes the drunkard with the *non compotes*. Intemperance is, in truth, temporary insanity; the brain is incapable of performing its proper functions; there is temporary mania — but that species of derangement, which, when the exciting cause is removed, ceases; sobriety brings with it a return of reason. SWINBURNE says,[1] "he that is overcome by drink during the time of his drunkenness is to be compared to a madman, and, therefore, if he makes his testament at that time, it is void in law; that is where he is so excessively drunk, that he is utterly deprived of the use of reason and understanding, otherwise albeit his understanding is obscured and his memory troubled, yet he may make his will being in that case."

[1] Pt. 2 and C.

Where the testator was habitually addicted to the use of spirituous liquor, under the actual excitement of which he talked and acted in most respects like a madman, it was held that as he was not when the will was executed under the excitement of strong drink he was not to be considered as insane.[1] The presumption is in favor of the will when it is shown that the man is not intoxicated at the time he signs it, and that presumption is strengthened or impaired by the internal evidence of its contents.[2] A drunkard is only incompetent to act when at the time of the act challenged his understanding was clouded, or his reason dethroned by actual intoxication.[3]

The effect of drunkenness in producing such incapacity as will invalidate a will is precisely the same as that of any other mental obscuration from whatsoever cause arising.[4] Although drunkenness of itself is no legal exception to the validity of a will, still if habitual intoxication has besotted a man's senses and destroyed his understanding his will will not be good.[5] And if the

[1] Starrett v. Douglas, 2 Yeates, 48.

[2] Ayrey v. Hill, 2 Add. 206; Billinghurst v. Vickers, 1 Phill. 191; Dyers v. Coldwell, 2 Lee, 120; Anderson v. Welch, 1 id. 577; Handey v. Stacey, 1 F. & F. 274.

[3] Peck v. Carey, 27 N. Y. 9; Gardiner v. Gardiner, 22 Wend. 526; Duffield v. Morria, 2 Harr. 385.

[4] Redfield on Wills, 161.

[5] Starrett v. Douglas, 2 Yeates, 48; Duffield v. Robeson, 2 Harr. 375.

drunkenness is so profound as to deprive the individual of a disposing mind, it will invalidate any will made during its continuance just as much as the mental disease which is the result of a long course of habitual indulgence. Redfield considers that it can make no difference in regard to the capacity to execute a will whether the understanding is permanently gone from habitual inebriety, or temporarily from an occasional or accidental fit of drunkenness.[1]

Mere proof of drunkenness does not invalidate a will,[2] for the various degrees of drunkenness produce various degrees of capacity, and the law in its wisdom has not seen fit to set up any particular mental standard for testators, but saying that all men with sufficient capacity to make a will may do so, leaves the question of the effect of the drunkenness to be determined in each particular case. Even habitual drunkenness is not of itself sufficient to invalidate a will.[3]

A testator's habits of intemperance were such that his wife and children were compelled to abandon his residence about twelve or thirteen years before he died; after which his health became completely undermined by his indulgence in strong drink. About three weeks before his

[1] Redfield on Wills, 161

[2] Shelford on Lunatics, 274, 304.

[3] Hight v. Wilson, 1 Dallas, 94.

death, and while confined to bed from weakness and general debility, acting on the suggestions of persons about him, he obtained, through the intervention of his brother-in-law, whose children took a valuable interest under his will, the services of a solicitor, who took instructions from him and prepared his will in accordance therewith; which will was executed by him in presence of such solicitor and another witness. By his will he deprived his own family of the greater portion of his property, devising it to the children of his brother-in-law. Medical evidence was adduced tending to show that from the long-continued habit of drinking, in which the testator had indulged, his mind was in such a state as to render him unfit to make a will. On the other hand, a medical practitioner, who was attending him at and subsequent to the time the will was executed, swore he was competent to do so, and the professional gentleman who prepared the will was of that opinion. The court (SPRAGGE, C.), on a balance of the evidence, decided in favor of the testamentary capacity, so far as the plea of intemperance was concerned. The learned chancellor remarked, "If the medical witnesses had said the thing was impossible (that is, the existence of testamentary capacity), I must still have exercised my judgment between facts sworn to and matters of scientific opinion; and facts may be established by such clear and convincing testimony, in the face of opinion evi-

dence by scientific men, that they must be accepted as established, although, in the opinion of those well qualified to form a scientific opinion, they are held to be improbable or even impossible."[1]

The question is, not whether the testator, when making his will, knew that he was giving all his property to some and excluding others from any share of it, but whether he was at that time capable of recollecting who those relations were that he was excluding, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice of the disposition might cast some light upon the question of his capacity.[2]

The delirium of drunkenness is short lived, it is more strictly temporary than even the delirium of disease and when the fit is off, the patient is at once restored to perfect reason, and there is no legal presumption of the continuance of the delirium since it ceases at once

[1] Bell v. Lee, 28 Grant (Ont.), 150; Waterhouse v. Lee, 10 id. 186.

[2] Banks v. Goodfellow, L. R, 5 Q. B. 551.

almost, unless the exciting cause is renewed; so one who is addicted to the frequent and injurious use of ardent spirits may execute a perfectly valid will, if he has lucid and sober intervals, and that will is the result of his free choice, influenced only by reason and affection, and uninfluenced by poison or disease.[1] In this there is a distinction, in so far as law is concerned, between drunkenness and insanity, a distinction which is well brought out by Sir John Nicholl. In the case of insanity, the disease may be latent, but in that of drunkenness, if it is to affect the will at all, it must be actual; it must manifest itself in excitement, and excitement in such a degree as to vitiate the act done: "For, I suppose," he remarks, "I suppose it will be readily conceded, that under a mere slight degree of that excitement, the memory and the understanding may be in substance as correct as in the total absence of any exciting cause. Whether, where the excitement is proved to have actually subsisted at the time of the act done, it did or did not subsist in the requisite degree to vitiate the act done, must depend in each case upon due consideration of all the circumstances of that case in particular; it belonging to a description of cases that admits of no more definite rule applicable to the deter-

[1] See Temple v. Temple, Hen. & Munf. 476; Black v. Ellis, 3 Hill, 68; Shelf. on Lunacy, 276.

mination of them than the one I have suggested, that I am aware of."[1] Where drunkenness is relied upon as evidence of a want of testamentary capacity, if the testator's habits are not such as to render him habitually incompetent to transact business the burden of proof of incapacity, on the ground of casual intoxication, is upon those who desire to invalidate the will.[2]

In a *nisi prius* case which was tried before Lord CAMPBELL, the will was impeached on the ground that the testator's mind was impaired by drinking, and that he was under the undue influence of the devisee or his family. It appeared that the testator had been addicted to drinking, and had had *delirium tremens* a few days before the will was executed, and that the will was drawn up by the son of the devisee, at his house, he being an old friend of the testator. It was held, that the question was whether the testator was sane and sensible, and able to understand the nature and contents of his will at the time it was executed, and that if the testator had really requested the son of the devisee to draw up the will, and it was his voluntary and spontaneous act, not under constraint, and free from force or fraud, and from imposition and importun-

[1] Avrey v. Hill, 2 Add. 206; Jarman on Wills, I, p. 54; see Corey v. Corey, 1 Ves. Sen. 19.

[2] Andres v. Keller & Miller, 2 Green Ch. 604.

ity, there was no undue influence, and the will was valid.[1] In a case which came before the New York Court of Appeals, and which is referred to in Dr. Redfield's work on the Law of Wills,[2] it was held that neither intoxication, nor the actual stimulus of intoxicating spirits at the time of executing the will, incapacitates the testator, unless the excitement be such as to disorder his faculties, and pervert his judgment. It was further held, that the dispositions of the will may be considered for the purpose of determining the testator's condition at the time of executing it. But in order to defeat the will upon this ground alone, such dispositions must not only be in some degree unreasonable and extravagant, but they must depart so far from what would be regarded as natural, as to appear fairly referable to no other cause than a disordered intellect. The will of a confirmed drunkard, although executed after a protracted debauch, and although the testator had drank several times during the day, as he was not intoxicated at the time of executing it, was confirmed.[3]

Actual insanity may often be latent, but there can scarcely be such a thing as latent ebriety, and so where a will is sought to be upset on the

[1] Handley v. Stacey, 1 F & F. 574.
[2] 3d ed.,*163.
[3] Peck v. Carey, 27 N. Y. 9.

ground of mental incapacity arising from mania produced by drinking, all that those sustaining the will must prove is, the absence of excitement at the time of the execution, or at least the absence of excitement in any such degree as would vitiate the act done. In one case where excessive drinking and eccentricity were proved, and the attesting witness could speak of nothing but the mere execution, and where the attorney who prepared the will, and in whose office it was executed, was himself named as executor and residuary legatee, still the will was confirmed as certain papers in the testator's handwriting showed his capacity and a knowledge of its contents.[1]

Intemperance is, in truth, temporary insanity; the brain is incapable of performing its proper functions. But where no fixed and settled delusion is shown, and consequently no decided insanity, and an extravagant act of a party can be accounted for by the excitement of liquor, while at all other times his mind was sound; in order to avoid a will made by him, it must be proved that he was so excited by liquor, or so conducted himself during the particular act, as to be at the moment legally disqualified from giving effect to it.[2] It seems that Lord MANSFIELD considered it a misdemeanor for persons to obtain by artifice

[1] Wheeler v. Alderson, 3 Hagg. 602–608.
[2] Wheeler v. Alderson, *supra*.

a will from a woman greatly addicted to, and almost destroyed by liquor.[1]

When the law says that to render a will valid, it must be executed in the presence of one or more witnesses, the presence must not be a mere bodily presence, but a mental presence as well; the law's demands will not be satisfied if a witness is insane or intoxicated, asleep or inattentive at the time the will was executed.[2]

[1] Rex v. Wright, 2 Burr. 1099.
[2] Taylor on Evidence, 967.

CHAPTER VIII.

INSURANCE.

THE question of intemperance comes up before the courts very frequently in considering claims upon life and accident insurance policies.

Many policies contain stipulations to the effect that the company issuing them will not be liable where the holder has died from intemperance, or been injured while intoxicated, or been habitually intemperate. A "drunken fellow" is not considered a good life by insurance companies;[1] and as to what is a drunken fellow, Sir Walter Scott, in apologizing for a drunken clergyman, said: "The crime of drunkenness consists not in a man being in that state twice or thrice in his life, but in the constant and habitual practice of the vice; the distinction between *ebrius* and *ebriosus* being founded on common sense and recognized by law."

An accident policy contained a condition providing that no claim should be made thereunder "where the death or injury may have happened while the insured was, or in consequence of his

[1] Weskett, Insurance, 335.

having been, under the influence of intoxicating drink." The insured was dining with a friend and twitted him with being a bad marksman, saying, "You cannot shoot a frog." The friend replied, "I can shoot your ear." "I will let you try for ten cents" was the foolish reply. The shot was fired, and hit the insured, not on the ear but in a vital part, and fatally. When an action was brought upon the policy it was held that if the death occurred while the insured was under the influence of intoxicating drink the policy was avoided, without regard to the question whether that state was the natural and reasonable cause of the death, or in any manner contributed thereto. The court also thought that a provision in a policy such as the one mentioned was proper and reasonable.[1]

A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate or predisposing cause; although, when several causes contribute to produce death it may be difficult to determine which is the remote and which the immediate cause. Yet the difficulty does not remove the necessity of the determination. If a policy provides that it is to be void if the insured should "die by reason of intemperance, from the use of intoxicating liquor;" to enable the company to

[1] Shader v. Rway. Pass. Ass. Co., 66 N. Y. 441.

successfully plead such a defence it must be shown that intemperance was the paramount and proximate cause of the death. If it was only a contributory cause, and not the sole, or at least paramount cause, the defence cannot avail; neither intemperance combined with other causes, nor intemperance as a secondary, remote and predisposing cause, will avoid the policy. Habits of intemperance, doubtless, have a tendency to shorten life; but if on this ground payment of a loss could be resisted, no insurance, though knowingly taken on the life of an intemperate man, would be of any value. To entitle the company to succeed it should appear that intemperance was the cause of death, so recently prior to the death, and having such an obvious connection with it, that the death may be clearly traceable to it and fairly be said to have been produced by it.[1] So, as it appeared in a case that the insured, when in a fit of *delirium tremens*, escaped from those in whose charge he was, and, scantily clothed, ran out into the street, where he was exposed to inclement weather; and the exposure, combined with the intemperance, brought on congestion of the lungs, which ended in death. The court held that the defence raised under the clause exempting the company if death ensued by reason of intemperance from the use of intoxicat-

[1] Miller v. Mutual Ben. L. Ins. Co, 31 Iowa, 216.

ing liquor must succeed; whether the congestion was caused by the exposure or the intemperance, they were both the direct consequences of intemperate use of intoxicating liquor.[1]

In another case, where the deceased had been insured in the same company, the same defence was raised, and there was proof that the insured had *mania â potu*, caused by intemperance from the use of intoxicating liquor, and that such disease is often fatal. There was also evidence that morphine and other medicines had been administered in large quantities to the insured by his attendant physician. The claimants insisted that death had resulted directly and immediately from the excessive quantities of opium thus administered, and not from the disease or the excessive drinking. At the trial the court rightly instructed the jury, that if the disease was *delirium tremens* or *mania â potu*, or other disease resulting from intemperance from the use of intoxicating liquors, and that disease, though not necessarily mortal, yet from want of helpful application, or neglect of proper care or treatment, produced exhaustion or fever and consequent death, the death would properly be considered as resulting from the intemperance, even if the disease was not so mortal in itself but that with good care and under favorable circumstances the insured might have recovered; yet

[1] 34 Iowa, 222.

if it became the cause of death by reason of the most efficacious mode of treatment not having been adopted, then the plaintiff would not be entitled to recover. If the death was caused by any drug administered to him in the course of medical practice, for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug and not of the disease, then in such case, the death could not properly be considered as resulting from the intemperance in the use of intoxicating liquor, and the plaintiff upon that branch of the case would be entitled to recover.[2]

Every one who has insured his life knows the numerous questions which are asked touching not only his sisters, his cousins and his aunts, his parents and grandparents, but also his very aches and pains and private habits. Falsehood in the answers to these questions is as fatal, as far as the life of the policy he may get is concerned, as it was to Ananias and Sapphira. Equivocation in the answers as to health and habits especially is as disastrous as falsehood.[2]

Generally, by the contract between the insurers and the insured, the replies given are warranted to be true, and it is agreed in the policy, that, if they are untrue or deceptive in any

[1] Ranney v. Mut. Ben. Life Ins. Co., May on Ins., 333.
[2] Smith v. Ætna Life Ins. Co., 49 N. Y. 211.

respect, the contract shall be void and of no effect.

The parties have a right thus to agree if they choose, and if they do they are bound by the agreement; and if the answers are untrue the policy is avoided, although there are no intentional or fraudulent misstatements. Hence the necessity of understanding the questions asked, and the conditions upon which the policy issued.

A man who was addicted to periodical and habitual spreeing represented, when applying for an insurance, that he was temperate in the use of intoxicating liquor. On an action being brought for the amount insured, the court in Ohio held that he had been guilty of such misrepresentation as avoided the policy; and most people will probably say that the court was about right.[1] A man cannot truly be said always to have been sober and temperate, who though usually of sober and temperate habits, occasionally indulges in drunken debauches, which sometimes terminate in *delirium tremens*.[2]

A warranty that the insured is of sober and temperate habits means, that at the time of the insurance and for such a reasonable time prior thereto as would allow of a man evincing a habit, the insured was a temperate man. And how

[1] Mut. Ben. Ins. Co. v. Holterhoff, 2 Cinc. (Ohio) 379.
[2] Ibid.

long does it take to acquire a habit? The authorities differ on this point; Cowper says, "Habits are soon assumed." The Latin writer remarks, "*Nemo repente fuit turpissimus.*"

When the matter comes before a jury, in an action by the representatives of the insured to recover the amount of the policy, the question is not whether the deceased was intemperate to such a degree as to injure his health, but simply was he sober and temperate. The insurers have a right to protect themselves by guarding against the extra risk they run where the insured has pernicious habits; and if one says that he is habitually sober and temperate when he is an habitual drunkard, he loses his rights under the policy, even though his health may be good and his constitution unimpaired and unaffected by his habits.[1]

"What is meant by the expression, 'intemperate habits'?" The court in Alabama once asked itself in a case brought under the statute forbidding the sale of liquor to persons of such habits, and to its query itself replied. "Habit is defined to be 'fixed or established custom, ordinary course of conduct.[2] Webst. Dic.'" It need not be the uniform or unvarying rule, but to be a habit it must be the ordinary course of conduct — the

[1] Southcombe v. Merriman, 1 Car. & M. 286.

[2] Tatum v. State, 63 Ala. 147.

general rule or custom. It may have exceptions. Exceptions do not destroy a rule. But unless, when occasion offers, there is a disposition, or probable inclination, to drink to excess, intemperate habits cannot be predicated. If sobriety is the rule, and occasional intoxication the exception, then the case is not brought within the statute. On the other hand, if the rule or habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established. Now, to make out this charge, it is not necessary that this custom shall be an every-day rule. There are persons whose "custom is to remain sober while at home, and who, when in company, or visiting the town or village, generally drink to excess, although occasionally they abstain and remain sober. In such case, drunkenness is shown to be the rule, or ordinary course of conduct." So one may be of "intemperate habits" without being drunk every day, but the court held that getting drunk two or three times a year was not an "intemperate habit."

A "declaration" is not as strong as a "warranty." An applicant for life insurance "declared" that he had never practised any pernicious habit tending to shorten life, and that he never would. Afterward he took to the wine cup, and died. An action was brought upon the policy; the company refused payment on the ground of breach

of contract. The court, however, held that the policy was not avoided, saying that the insured did not covenant, promise, agree or warrant that he would not practice any pernicious habit; he declared that he would not. To declare is to state, to assert, to publish, to utter, to announce clearly some opinion or resolution; while to promise is to agree, to pledge one's self, to engage, to assure or make sure, to pledge by contract. (Worcester received credit this time.[1])

In one case it was held that the phrase "addicted to the excessive use of intoxicating liquors," meant not the occasional excessive use, but the habitual excessive use.[2] If one has had *delirium tremens* shortly previous to the issue of the policy, or been attended by his physician on account of the effects of excessive drinking, he should reveal the fact to the insurance company, at least if he wishes the policy to produce the golden fruits—so vividly described by insurance agents—for the support of his widow and fatherless children.[3] In Scotland, on one occasion, an applicant stated that he was in perfect health; the medical and other referees, to the question whether they knew any reason why an insurance on his life would be more than usually hazardous, answered, "No."

[1] Knecht v. Mutual Life Ins. Co., 90 Penn. St. 118.

[2] Mowry v. Home Ins. Co., 1 Big. Life and Acc. Ins. Co. 698.

[3] Hutton v. Waterloo Life Ass. Co., 1 F. & F. 735.

The man was in the habit of using spirituous liquors to such an extent as to impair his health. The Court of Sessions held that the non-communication of this fact avoided the policy.[1]

Habits of intemperance acquired subsequent to the insurance, even though the cause of death, will not void the policy unless it is expressly so stipulated.[2] In *Odd Fellows Mutual Life Insurance Co.* v. *Rohkopp*,[3] a policy of life assurance contained a clause that the company would not be liable if the insured became so far intemperate as seriously or permanently to impair his health. In an action brought upon the policy, *held*, that evidence to show that deceased was an habitual drunkard prior to the date of the policy, and that he had created an appetite which had become fixed upon him, but which had not seriously injured his health at that date; to be followed by the testimony of experts to show that the amount he drank before that date, together with what he drank afterward, was sufficient to seriously impair a man's health; was inadmissible, as being immaterial and irrelevant. The court said: "The offer did not propose to show that he thereafter became so intemperate as to either seriously or

[1] Forbes v. Edinburgh Life Ass. Co., 10 Ct. of Sess. Cas., 1st rev., 451.

[2] Reichard v. Manhattan Life. Ins. Co., 31 Mo. 518; Horton v. Equitable Life Ass. Soc., 2 Big. Ins. 2-108.

[3] Penn. Sup. Ct., March 17, 1880, 8 W. N. C. 489.

permanently impair his health. It was to show by experts that the amount he had drank before with the amount he had drank afterwards was sufficient to seriously impair a man's health. The capacity of persons to drink liquor is so unequal, and the effect is so different on different individuals, it by no means follows that a quantity sufficient to affect some other man's health had the same effect on the health of Rohkopp. The question in issue was, did his intemperance so affect him? The court opened the door wide and permitted the plaintiff in error to give all the evidence offered of Rohkopp's intemperate habits and the effect on him. That he was habitually intemperate was not denied or controverted. It was clearly proved. The contention was whether its effect was such as to bring him within the clause of the policy which would prevent a recovery. Possessing a constitution and health which habitual intemperance for so many years had been unable to seriously injure showed a capacity to withstand its action that justly confined the evidence to the effect that liquor had on him, and not what effect it might have on some other person." SHARSWOOD, Ch. J., and GORDON and TRUNKEY, JJ., dissented. This condition was distinguishable from the usual conditions that the habits of the insured are sober and temperate, (in which case it is sufficient to show the contrary, and it is no answer that the

intemperance was harmless);[1] and that the policy shall be void if the insured die from the use of intoxicating liquors.

Among the various questions put to Mr. Henry, when he applied to the Home Life Insurance Company for a policy, were the following: 6. Is your health good (and as far as you know), free from any symptoms of disease? 9. Are your habits uniformly and strictly sober and temperate? 10. Have you ever been addicted to the excessive or intemperate use of any alcoholic stimulant or opium? 10 (6). Do you use habitually intoxicating drinks as a beverage? To the first and second here given Henry replied in the affirmative, to the others in the negative. At the trial, the court said the questions were to be taken to mean what the words employed usually and commonly mean; that when Henry stated that he had never been addicted to the excessive or intemperate use of alcoholic stimulants, it was not a statement that he had never been addicted to the use of intoxicating liquor at all, but that he had never been addicted to the excessive and intemperate use of them, and it was untrue if Henry had, and only in case he had, been addicted to the excessive or intemperate use of alcoholic stimulants; that the second and fourth questions and answers related to the habits of the

[1] Southcombe v. Merriman, 1 Car. & M. 286.

party in that respect. If the company had not intended to insure any person who used intoxicating liquor at all, it would have been very easy to ask a question to that effect, but they did not do so. The occasional use of intoxicating liquor by the applicant would not make these answers untrue, nor would they be rendered untrue by any use of intoxicating drink which had not made his habits those of a man not uniformly and strictly sober and temperate, or which did not amount to habitual use of such drinks as a beverage.

The company also complained that the answers to these questions were not full, correct and true, as Henry warranted them to be. The court thought that a distinction was to be taken between untruthful answers to specific questions and the mere failure to make full answers. Such failure, under such a warranty, to defeat the policy must relate to some circumstance which might render an insurance more than usually hazardous, or which might affect unfavorably his prospects of life; while an untruthful or incorrect answer to the specific questions asked renders the policy absolutely void though made in relation to a matter not material to the risk.[1]

A policy contained a condition that the company should not be liable thereunder if the in-

[1] **Swick v. Home Life Ins. Co., 2 Ins. L. J. 415; May on Insurance, p. 329.**

sured should die by his own hand. While drunk the insured took laudanum and died; the plaintiff insisted that the drug was taken by mistake. The court said if the assured drank to intoxication and while in this condition, by accident or mistake, took an overdose of laudanum and died therefrom, this was not dying by his own hand, in the sense of the words as used in the policy, even though the mistake or accident was in some sense occasioned by the drunkenness. But if he took the dose with the intent to destroy himself, though it was but the intent of a drunken man, this was dying by his own hand.[1]

Where a policy provided that it should be void if the insured should become so intemperate as to impair his health, the company may — if the insured falls into such bad habits — maintain a suit in equity to have the policy cancelled and surrendered upon payment of its surrender value.[2]

[1] Equity Life Ass. Soc. v. Patterson, 41 Ga. 338; S. C., 5 Am. Rep. 555.

[2] Conn. Mut. Life Ins. Co. v. Home Ins. Co., 17 Blatchf. 142.

CHAPTER IX.

MARRIAGE.

CAN a drunken man be married? Marriage is a contract just as much as buying a penn'orth of snuff, or a ha'p'or'h of hair-oil, although it differs from other contracts in that the parties cannot annul it or vary its terms at their pleasure. As consent is an essential ingredient of any contract, there cannot be a valid marriage when there is a want or a deficiency of understanding, and so an absence of consent in either of the parties. The old Romans used to say: "*Consensus non concubitus facit nuptias;*" the English jurists echo the sentiment, and Chancellor KENT adds: "This is the language of the common and canon law, and of common sense."[1] One cannot force a man to be married against his will; his consent must be an intelligent consent, and not one his mind does not go with.

In the days usually called "the good old days," when George the Third was king, and the Fleet marriages formed one of the strangest scandals of English life, many a man in the excitement of drink was inveigled into a sudden marriage which

[1] 2 Comm. 87.

blasted all the prospects of his life. In some cases when men slept off a drunken fit they heard to their astonishment that during its continuance they had gone through the marriage ceremony with the aid of some parson, perchance a prisoner in the Fleet prison for debt and a man of notoriously infamous life), without any license and in some public-house or brothel, or garret. Sometimes between two and three hundred weddings took place within a week in the neighborhood of the prison. One parson married 173 couples in a single day, chiefly sailors entrapped through wine.[1]

Now, however, it seems clear that a marriage of an idiot is absolutely void, and that of a lunatic, unless it is during a lucid interval, is also absolutely void;[2] and that mental incapacity produced by drunkenness has the same effect as any any other kind of insanity. It matters not whether the mind be diseased more or less, or by what cause, *delirium tremens* or otherwise, so long as perfect consent does not exist the marriage is not binding.[3] But the insanity, or want of mind, must exist at the time of the marriage, and if, after a lucid interval, the party ratifies the marriage, both parties are fast bound.

In order to render void a ceremony of marriage,

[1] Lecky, England in XVIII Century, ch. 3.
[2] Browning v. Reane, 2 Phill. 69.
[3] Proffat, Woman under the Law, ch. 2.

otherwise valid, on the ground that the man was intoxicated, it must be shown that there was such a state of intoxication as to deprive him of all sense and volition, and to render him incapable of knowing what he was about. It would appear that a combination among persons, friendly to a woman, to induce a man to consent to marry her, it not being shown that she had done anything to procure her friends to do any improper act in order to bring about the consent, would not avoid marriage.

A marriage entered into while the man is so intoxicated as to be incapable of understanding what he is about is voidable only and may be ratified and confirmed.

Three years after the ceremony of marriage which the man alleged he had been induced to enter into while under arrest and intoxication, an action at law being brought against him for necessaries furnished to the woman and for expenses incurred in the burial of her child, in which the validity of the marriage was distinctly put in issue, the man signed a memorandum indorsed on the record in which he admitted the existence and validity of the marriage, and consented to a verdict for the plaintiff in the action: *Held*, that if the marriage was previously voidable, it was thereby confirmed.[1]

[1] Roblin v. Robiin, 28 Grant (Ont.), 439.

In Scotland intoxication is a good reason for setting aside a marriage entered into by a person in that state; and in one case a marriage was set aside where the bride was in such a state of intoxication as to be incapable of consenting to the performance;[1] and Lord STOWELL made some remarks from which it would appear that the same rule would prevail in England.[2]

Where a man, in the prime of life, married an old woman of seventy, an habitual drunkard and very infirm but possessed of the redeeming quality of owning considerable property, the marriage, which took place without the knowledge of any of the lady's friends and without any settlements, was set aside. This was an extreme case, for the woman had always, from her youth up, been a silly, foolish person; moreover she had a very weak intellect, was in fact almost an idiot; the older she grew the worse she got; her mind was so weak that — *mirabile dictu* — she was incapable of understanding the nature of courtship, or marriage, or of consenting to a marriage; she, poor body, spent her time neither "in making nets," nor "in making cages."[3]

On the other hand where a man, whose mind had been very weak from his infancy and was

[1] Erskine's Principles, p. 109; Johnston v. Brown, 2 Shaw & Dunl. 495.

[2] Sullivan v. Sullivan, 2 Hag. Cons. 246.

[3] Browning v. Keane, 2 Hill, 69.

occasionally disordered from the effects of drinking, suddenly purchased a license and without any previous deliberation or intention rushed rashly into the bonds of matrimony; and he went through the ceremony (as the clergyman who officiated proved) with as much propriety as any man could. The court considered that he had sufficient capacity to contract a binding marriage, as no evidence was produced to show any mad action about the time he took his rash leap into matrimonial darkness; and permitted the bride and bridegroom to "in one union their hearts, their fortunes and their beings blend." [1]

[1] Parker v. Parker, 2 Lee, 382.

CHAPTER X.

RIGHTS.

IF a man is so intoxicated that he is not able to take proper care of himself and an injury happens to him, he will be considered guilty of contributory negligence, and will be unable to recover any damages for his hurts.[1] Proof that a man was intoxicated when injured is not by itself sufficient to charge him with contributory negligence and so prevent his recovery; the intoxication must be so great as to disable him from exercising ordinary care.[2]

A man, very much intoxicated, started to cross a bridge which was out of repair; he had been warned that it was unsafe and told that there was another a few feet off; he fell off the bridge and was killed. The Supreme Court held that his conduct was contributory negligence and that no recovery of damages could be had against the town for the non-repair of the structure.[3]

One's intoxication is no excuse for want of care; it was, however, thought at one time, in Illinois,

[1] Ill. Cent. Ry. v. Cragen, 71 Ill. 177; Cramer v Burlington, 42 Iowa, 315.

[2] O'Hagan v. Dillon, 42 N. Y. Sup. Ct. 456.

[3] Wood v. Andes, 18 N. Y. Sup. Ct. 543.

that although a drunken man is not excused from diligence and care still perhaps he would not be held to that high order that is exacted from a sober person.[1]

"It is a fundamental principle," says Wharton, "that a traveler is bound to look out; 'tis true, he need not have perfect eyesight, but it is negligence on his part to travel along a road unattended, if he is drunk.[2] The rule is that when the injury is a consequence flowing, in the usual course of events, from the injured one's misconduct, then he cannot recover."

So a drunken man cannot recover for an injury caused by his coming into collision with an obstacle negligently left upon the road; because an intoxicated man precipitates himself against whatever is in his way, and as something in any ordinary drive will be sure to be in his way the question of the negligence of the person who left the particular object run against in the road is immaterial.[3] As Lord Ellenborough remarked, "a party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right, and one person being in fault will

[1] Ill. Cent. Ry. v. Hutchenson, 47 Ill. 408.

[2] Wharton on Negligence, § 402; Cassidy v. Stockbridge, 21 Vt. 391; Alger v. Lowell, 3 Allen, 402.

[3] Wharton, § 332.

not dispense with another's using ordinary care for himself."[1] If one meets with a fatal accident through a defect in the highway, and there is no evidence of how it occurred, the jury may consider his habits of temperance and caution, and knowledge of the locality, upon the question of reasonable care.[2]

A man does not become an outlaw and beyond the pale of society merely because he is intoxicated; as long as he behaves himself in a proper manner he is entitled to the same rights and privileges as his sober fellow-man. He is still entitled to ride in the cars, and is still entitled to demand from the company's officials and servants the same amount of care as they are required to bestow upon those who are not drunk.[3] In fact if the conductor of a train knows that one of his passengers is intoxicated and unable to take care of himself he, having him as a passenger, is bound to give him an amount of attention while under his care beyond that of an ordinary passenger so as to secure his safety, just as if he were sick.[4] And if a man is injured through negligence the guilty party cannot show, in mitigation of damages, that the injured one is a man of

[1] Butterfield v. Forrester, 11 East, 60.
[2] Cassidy v. Angell, 12 R. I. 447.
[3] Milliman v. N. Y., etc., 66 N. Y. 643.
[4] Giles v. G. W. R., 26 Q. B. (Ont.) 360.

intemperate habits and has greatly abused his health and system thereby.[1] Although in one case, where at the time of the accident the injured man was in bad health, suffering from dyspepsia, difficulty of breathing, defective memory and irritable temper (all symptoms of softening of the brain), BYLES, J., told the jury that the executrix of the deceased was only entitled to recover for actual pecuniary loss; that if sound at the time of the accident he might have lived for many years; if unsound he would have died in a short time, or a year or two, and the amount of damages would be less.[2]

If a man is so intoxicated as to be disgusting, offensive and annoying to others, a railway company is not bound to carry him in their train, even if he has a ticket.[3] And, in fact, it is not only the right of the company to expel a drunken, unruly and boisterous passenger, but when such a one endangers, by his bacchanalian conduct, the lives of others, it is the duty of the conductor to remove him.[4] If need be he must stop the train, summon to his aid the engineer, stoker brakemen and such of the passengers as will obey his call,

[1] Baltimore, etc., R'way v. Boleter, 38 Ind. 568; but see Birkett v. Whitehaven Junction R'y, 4 H. & N. 732.

[2] Birkett v. Whitehaven Junction R'y, *supra*.

[3] Pitts., C. & St. L. R. R. v. Vandyne, 57 Ind. 576; Hodges on Railways (6th ed.), 549.

[4] Railway v. Valleley, 32 Ohio, 345.

and leading on his *posse comitatus*, expel the disturber of the peace or, at least do his best to do so.[1] If he fail to subdue the unruly follower of Bacchus, he should either discontinue his trip or give the other passengers an opportunity of leaving the cars; otherwise the company will be responsible for the sins of the rioter.[2] In one case a company had to pay for an eye lost by a passenger through the quarrel of some drunken men,[3] and in another for a broken arm.[4] If the man keeps quiet after admonition, he may be suffered to remain; and if there is nothing in the conduct, appearance or manner of a passenger, from which it can reasonably be inferred that he means mischief, the company will not be responsible for any sudden outbreak or attack.[5] If a man must be ejected, he should be removed in such a way as not to inflict any wanton or unnecessary injury upon him, and he should not needlessly be placed in any peril of life or limb.[6] If one push a drunken man against another, and thereby hurt him, number one is guilty of an assault; but if number one intended doing a rightful act, such as to assist the drunkard or to prevent him get-

[1] Pitts., etc., R. R. v. Hinds, 53 Penn. St. 512.
[2] Redfield on Railways, II, p. 234.
[3] Pitts., etc. v. Pillow, 7 Leg. Gaz. 13, Sup. Ct. Pa.
[4] Pitts., etc., R. R. v. Hinds, *supra*.
[5] Putnam v. Broadway, etc., R. R., 55 N. Y. 108.
[6] Railway v. Valleley, 32 Ohio, 345.

ting injured by walking alone, and in so doing some one is hurt, he will not be answerable.[1]

Practical jokers are just as responsible for the effects of their playful pranks upon drunken men as they would be if the men were sober. On one occasion some men found a drunken man lying down; they covered him up with straw and then threw some hot embers upon him, whereby he was burned to death. The judge charged the jury, when these men were on their trial for murder, that if they believed that the prisoners really intended to do any serious injury to the deceased, though not to kill him, it was murder. But if they believed their intention to have been only to frighten him in sport, it was manslaughter. The verdict was manslaughter.[2]

A person cannot be imprisoned at common law for being drunk in a public street.[3] Nor can he be arrested for being intoxicated in his own house, although some of his family may be anxious to have him taken off; unless, indeed, he is creating a disturbance.[4] And although an innkeeper, if drunk upon his own premises (*i. e.*, those parts open to the public during the licensed hours), while they are open, is as much amenable

[1] Short v. Lovejoy, Russell on Crimes, vol. I, p. 751.
[2] Ewington's Case, 2 Lewin's C. C. 217.
[3] *In re* Livingstone, 6 Pr. R. (Ont.) 17.
[4] Reg. v. Blakeley, 6 Pr. R. (Ont.) 244.

to the penalty for being drunk in a public place as if he was found so upon the highway, still he is not liable when found intoxicated in his own house after licensed hours and when it is not open to the public.[1] "Domus sua quique est tutissimum refugium." Although some Yorkshire magistrates did, once upon a time in their wisdom, fine a poor publican for being drunk in his own bed in his own house.[2]

Although, as a general rule, an innkeeper is bound to pay for goods stolen in his house from a guest, still if the guest, by his intoxication, has in any way contributed to the loss, he cannot make the hotel-keeper responsible.[3]

Sometimes it has been considered that jurors should not indulge in strong drink, and verdicts have been set aside for no other reason than that some of the twelve men, good and true, have drained the intoxicating cup when engaged upon their important and arduous duties. At the famous trial of the Seven Bishops, whenever the jury was about to retire to consider their verdict, the lord chief justice said urbanely: "Gentlemen of the jury, have you a mind to drink before you go?" What twelve men could resist, so the reply came readily, "Yes, my lord, if you please." Wine was then given to them. Modern

[1] Lester v. Torrens, L. R., 2 Q. B. 403.
[2] Wharton's Law of Innkeepers, 81.
[3] Walsh v. Porterfield, 18 A. L. J. 376.

courts and judges are more like that occupant of the bench mentioned in old Dyer, who, on being told that the jurymen, after they had retired, had eaten some apples, severely reprimanded them all; fining those who had eaten the pippins twelve shillings each, and those who had not, six shillings each, "for that they had them (the apples) in their pockets." Perhaps he considered cider intoxicating.

In England the question of treating jurors has recently been discussed, and an inquisition for damages in a compensation case against a railway company was set aside, on the ground that a champagne lunch was given by the claimant to the jury. Some novel distinctions were introduced on this subject. Mr. Justice GROVE distinguished nicely between an unpremeditated luncheon and a luncheon prepared beforehand, and between a champagne luncheon and a luncheon of every-day occurrence. The court considered that there might be a tendency to favor the person providing luncheon, and so the verdict was set aside.[1] Similar results have ensued in America where any of the jury have been treated or feasted at the expense of one of the parties.[2]

[1] Tanner v. Swinton & Marlborough Ry., Solicitors' Journal, 1881.

[2] Perry v. Bailey, 12 Kan. 539; Redmond v. Royal Ins. Co., 7 Phil. (Pa.) 167.

In a recent case it was held that if the successful party, or his attorney, should furnish intoxicating liquor to a juror during the progress of the trial, it would be a good ground for granting a new trial, unless it was clearly shown that the drink was not intended to influence the juryman's action, and did not, in fact, in any way influence his mind.[1] It has been asked by a writer on the champagne luncheon case, whether it would not be reasonable to hold, that the lunch, whether or not it had influenced the minds of the jurors in favor of the provider, had a tendency to render their minds unfit for the calm, deliberate and proper consideration of the subject and the right discharge of their duty. It has been so held in many of the American courts. It is very difficult and dangerous to lay down any cast-iron rule by which to gauge whether a juror has taken too much or not; and some of the courts seem to have pushed the matter too far, and to have held that even the slightest indulgence in inebriating liquors will incapacitate a juror, and render his decision liable to be set aside. The stringency of this rule has, however, been modified of late, and the law appears to be now well settled in the American courts, that the drinking is immaterial, unless shown to have amounted to intoxication, or to have been after the case was actually

[1] Pittsburgh, etc., Ry. v. Porter, 32 Ohio St. 328.

submitted to the jury for final decision, or to have in some way or another affected the verdict.[1]

Some of the decisions have been of such Spartan severity that they have caused a little pleasantry among English writers; especially one where the finding of the jury was set aside because one of the jurors, who had been permitted to retire for a few moments, drank a glass of ale at a grocery store; and another, where the verdict was upset because a juryman had taken one-third of a gill of brandy 'to check diarrhœa.'[2]

This subject has been lately well considered and the authorities reviewed in Iowa, and it was declared that the rule based upon the decisions is, that the use of intoxicating drinks pending a trial and before the final submission of the case to the jury, in the absence of any proof that prejudice resulted to the losing party therefrom, will not vitiate the verdict; although the jurors so indulging may render themselves liable for contempt of court.[3] In one case, the jurors drank small quantities of spirits; in another, they had a glass of liquor all round with the sheriff at a saloon; in a third, one juror had two glasses of beer; in a fourth, one took something strong at

[1] State v. West, 69 Mo. 401; S. C., 33 Am. Rep. 506; State v. Bruce, 48 Iowa, 530; S. C., 30 Am. Rep. 403.

[2] State v. Balby, 17 Iowa, 39; Brant v. Fowler, 7 Cow. 562.

[3] State v. Bruce, 48 Iowa, 530, and the authorities therein cited.

night for medicinal purposes;[1] but all the verdicts stood against the liquor.

There is a wide distinction between the duty of a juror during an adjournment of the court pending the trial, and his duty after the case is submitted to him for his determination, and there are many cases which go to establish the rule that, if a juryman drinks when the case has been intrusted to him for his decision, he is guilty of such great misconduct as to vitiate the verdict.[2] If, indeed, the intoxicant is taken as a medicine the court will be indulgent and not interfere, notwithstanding the brandy case before referred to.[3]

No doubt the indulging in strong drinks by some jurors before they have begun to deliberate upon their verdict has been sufficient to cause their labors to come to naught.[4] Yet one such case where the drinking of one spoilt every thing has been expressly overruled, and the other has been impliedly, and no other adjudications are in harmony with them.[5] There is no difference in this

[1] Roman v. State, 41 Wis. 312; Kee v. State, 28 Ark. 155; Van Buskirk v. Dougherty, 44 Iowa, 42; O'Neill v. Keokuk, etc., R'way, 45 id. 546.

[2] State v. Bruce, *supra*, and cases cited.

[3] Pipe v. State, 36 Miss. 121; Gilmanton v. Hann, 28 N. H. 108.

[4] People v. Douglas, 4 Cow. 267; Brandt v. Fowler, 7 id. 562.

[5] Wilson v. Abraham, 1 Hill, 207; Ryan v. Harrow, 27 Iowa, 494; Jones v. State, 13 Tex. 168; State v. Bruce, *supra*.

matter of drinking between civil and criminal trials.

The true American doctrine harmonizes with the English rule. Long since Coke wrote, that "if the jury, after the evidence given unto them at the bar, do at their own charges eat or drink, either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict; but if, before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant, it shall not avoid it, *et sic e converso*."[1] The treating alluded to here is evidently such as the whole jury partake of, and that only after the summing up is over. And not very long ago Lord ABINGER said that the cases only show that where all that remains for the jury is to deliberate upon and give their verdict, if they eat or drink at their own expense they may be fined, and if at the expense of the party for whom their verdict is given, it is void; and the cases seem to apply to the whole jury, and only to acts done by them after they are charged.[2]

In one case a juryman was going into the box in a state of intoxication; the judge noticed his condition, and of his own motion ordered him to

[1] Co. Litt. 227*b*.

[2] Morris v. Vivian, 10 M. & W. 138.

stand aside; and the court held that this was the proper thing.[1] And where, during the trial, all the jury partook of intoxicating liquors and one drank to excess, so that he was visibly affected, the verdict was set aside.[2] Even if all had abstained except the one, the verdict would not be allowed to stand.[3]

Although it cannot be said that the law is very fond of encouraging the use of intoxicating liquors, still it says that if men will drink they must have their liquors pure — they must get what they ask and pay for; if they seek whisky they must not be given a decoction flavored with copperas, opium, strychnine or tobacco, any more than temperance people are to get peas, beans or chicory when they ask for coffee. Fraudulent adulteration of drinks, *i. e.*, the debasing of pure or genuine commodities, for pecuniary profit, by adding to them inferior or spurious articles, is by no means a modern expedient among those who haste to be rich. As far back as the days of Henry III the dishonest practices of the vintners and brewers (as well, indeed, as of bakers and butchers) were so glaring that a statute, called the Pillory and Tumbrel Act,[4] was passed to protect the public. By this law, for the first offence,

[1] Bullard v. Spoor, 2 Cow. 430.
[2] Rose v. Smith, 4 Cow. 17.
[3] Perry v. Bailey, 12 Kan. 539.
[4] 51 Henry III, ch. 6.

the transgressor was drawn upon a hurdle from Guildhall to his own house, "through the great street where there be most people assembled, and through the great streets which are most dirty;" for the second offence he was drawn through "the great street of Cheepe, in the manner aforesaid, to the pillory, and remained there at least one hour;" for the third offence the additional punishment of compelling him to forswear the trade in the city was inflicted.

In the books of the Vintners' Company, under date 38 Edw. III, November 11, 1364, there is an entry to the effect that, before the mayor of London and the aldermen, "John Rightways and John Penrose, taverners, were charged with trespass in the tavern of Walter Doget, on Eastchepe, on the eve of St. Martin, and with selling unsound and unwholesome wines, to the deceit of the common people, the contempt of the king, the shameful disgrace of the officers of the city, and to the grievous damage of the commonalty. John Rightways was discharged, and John Penrose found guilty; he was sentenced to be imprisoned a year and a day, to drink a draught of the bad wine, the rest to be poured over his head, and to forswear the calling of a vintner in the city of London."

Under the act of Henry III officers were elected to test the goodness of the ale sold in the different manors of England; they were called

"ale conners" or "ale tasters," and no ale could be sold without having been first tasted and approved by the ale conners of the district. Even now these officers are elected in the city of London with the old formalities; but the real duty of examining the quality of ale, beer and porter has long been in the hands of the excise. Long ago, in England, the Vintners' Company had control over the price and purity of the wines sold; and there were chosen from the company, every year, "persons of the most sufficient, most true and most cunning of the craft (that held no taverns), who were to see to the condition of all wines sold by retail, and who were to govern the taverners in all their proceedings."

As far back as the reign of Queen Anne there was a law prohibiting the use of unwholesome ingredients in the brewing of beer, under severe penalties. Under the Licensing Act of 1872 the possession, sale or use of adulterated beer or spirits is forbidden in the United Empire. But nothwithstanding the efforts made to check the evil, the practice of adulteration has now become an art and a mystery, in which the knowledge of science and the ingenuity of taste are freely exercised, the adulteration of wine especially, has been brought to great perfection; so much so, indeed, that a great part of the wine of France and Germany has ceased to be the juice of the

grape at all; and it is hardly possible to obtain a sample of genuine wine, even at first hand.[1]

Adulteration is both a subject for indictment at common law, and actionable.[2]

Under the Prussian Penal Code the sale of adulterated or spoiled goods is punished by fine or imprisonment, and the confiscation of the goods; and the laws of Holland and France are similarly severe.

In some of the States of the American Union, as in Massachusetts, Connecticut and New York, the sale of impure, spurious or adulterated liquors is forbidden; in New York persons adulterating with poisonous or deleterious drugs and mixtures, liquors, or knowingly importing or selling liquors so adulterated, are guilty of a misdemeanor, and punishable by fine of $300 and imprisonment for three months. In Massachusetts an inspector and assayer of liquors is appointed, whose business it is to inspect, analyze and report upon all liquors sent to him for that purpose by the authorities of any municipality. In New Jersey, manufacturing or dealing in any spirits adulterated with spurious or poisonous ingredients of any kind is a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment at hard labor for not more than two years, or both

[1] Enc. Brit. (9th ed.), Adulteration.

[2] Wharton on Innkeepers, 68.

at the discretion of the court. And the adulterating any malt liquors, or the selling the same; or the mixing, compounding or poisoning any malt or vinous or spirituous liquors the one with the other, or in any other way whatever; or the giving, bartering or selling the same with the intent to make a greater profit, or with intent to produce intoxication or stupefaction is likewise a misdemeanor punishable by a fine of not more than $500 and imprisonment at hard labor for not more than a year, or either, as the court before whom the guilty party is tried may in its discretion think best.

CHAPTER XI.

WRONGS.

IN an action for bodily injuries, it is not necessary to show that there existed in the mind of the wrong-doer any evil design or intention, and so the law has held that both infants and lunatics are answerable for their torts, although they are wholly incapable of forming any deliberate design.[1] It follows, therefore, that drunkenness will be no defence in an action of tort.[2] Indeed, it may, in a certain way, be looked upon as an aggravating circumstance, when the question is material whether due care had been taken by the tort-feasor to avoid the accident out of which the cause of action arose. For instance, in an action to recover damages for injuries received by the plaintiff through the negligent driving of a sleigh, GIBSON, C. J., said: "The evidence of intoxication ought to have been received, not because the legal consequences of a drunken man's acts are different from those of a sober man's acts, but because where the evidence of negligence is nearly

[1] Co. Litt. 180, B. a.; Weaver v. Ward, Hobart, 138; Morse v. Crawford, 17 Vt. 499.

[2] Black. Com., vol. IV, p. 25.

balanced, the fact of drunkenness might turn the scale, inasmuch as a man partially bereft of his faculties would be less observant than if he were sober, and less regardful of the safety of others. For this purpose, but certainly not to inflame the damages, the evidence of intoxication ought to be admitted."[1]

Drunkenness is no excuse for slander.[2]

A man who drives carelessly along a highway, and thereby injures a passer-by, cannot excuse his recklessness by showing that he was drunk.[3] And a man who employs an intoxicated servant to do any act requiring care, is guilty of negligence whenever a knowledge of his servant's habits is imputable to him;[4] and if one continues knowingly to employ drunken, reckless or incompetent servants, he may be held liable for exemplary damages should the servants, through negligence, injure any one.[5]

One Martin was drinking in a tavern, and called for a quatern of gin; a child, four years old, of the innkeeper was present, and Martin

[1] Wynne v. Allard, 5 W. & S. 525; Reed v. Harper, 25 Iowa, 87.

[2] Reed v. Harper, *supra.*

[3] Wharton on Negligence, § 305; State Bank v. McCoy, 69 Penn. St. 195.

[4] Sawyer v. Sauer, 10 Kans. 466; Frink v. Coe, 4 Greene, 555.

[5] Ill. C. Ry. v. Hammer, 72 Ill. 347.

asked him if he would have a drop, at the same time putting the glass to the child's mouth; whereupon the infant snatched the vessel and drank the whole contents, which caused his death in a few hours. The man was tried for manslaughter, but Baron VAUGHAN said, "As this was the act of the child there must be an acquittal, but if it had appeared that the prisoner had willingly given a child of this tender age a quatern of gin, out of a sort of brutal fun, and had thereby caused its death, I should, most decidedly, have held that to be manslaughter."[1]

The deceased was standing up in a small boat at the side of the vessel on which Waters was; in the course of rough and drunken joking, Waters pushed the boat with his foot, in consequence the deceased fell overboard, and was drowned. Judge PARK would not consider this manslaughter.[2]

The Court of Chancery will interfere and remove a child from the care and custody of the father, on the ground of his constant habits of drunkenness and blasphemy. Lord ELDON stated that he had no difficulty in saying, "that if a father be living in a state of habitual drunkenness, incapacitating himself from taking care of his children's education, he is not to be looked

[1] Rex v. Martin, 3 C. & P. 211.
[2] Rex v. Waters, 6 C. & P. 328.

upon as a man of such reason and understanding as to enable him to discharge the duty of a parent; and if such a case were to occur, the court would take care that the children should not be left under the control of a person who so debased himself, and was so likely to injure them."[1]

[1] 10 Vesey, 61; 2 Russ. 30.

CHAPTER XII.

CRIMES.

IN the canon law drunkenness is expressly mentioned as a ground entitling an accused person to the indulgence of a reasonable judge, because whatever is done in that state is done without consciousness on the part of the actor; and besides, say the canonists, as God had indulgence toward the offence committed by the patriarch Lot, while in a state of intoxication, the clemency of an earthly judge is justifiable. They likened a drunken person to one under the influence of sleep.

In Germany, in the earliest writings of the most ancient practitioners of the Middle Ages, the principle is established that drunkenness is a ground of extenuation for crime. Since the time of Clarus, especially, the opinion had prevailed that the effect of the highest degree of drunkenness (that is, where there is an entire loss or disarrangement of consciousness, so that one is no longer aware of what he is doing, or at least of the consequence of his deeds, physically and legally), was, indeed, to exempt from the punish-

ment of a crime (*dolus*), but that the offender was still liable to the punishment of a fault (*culpa*), except in two cases, viz.: first, when the accused made himself drunk intentionally in order that he might commit a crime while in that state; and, secondly, when he became intoxicated without any fault on his part. In the first case he was not excused at all, and in the second he was deemed free from all blame.[1]

The same indulgent opinion as to the influence of intoxication upon criminal liability prevailed in Italy, Spain, Portugal and Holland during the Middle Ages. On the other hand, in France, England and Scotland, legal opinion developed in a direction precisely the opposite. In these latter countries the jurists set out with the principle that drunkenness is in itself a punishable act, and that those who commit an offence when in a punishable state deserve no exculpation. They also thought that it would be attended with too great danger to society to attribute a mitigating power to intoxication, as it could be easily assumed as a cloak for crime; and so they early established the doctrine that a criminal was in no case freed from his liability to punishment because he chanced to be drunk. In the Netherlands, too, by an ordinance of Charles V, intoxication was not allowed to free an accused from

[1] Mittermaier on the Effect of Drunkenness, etc., § 3.

the punishment usually inflicted upon his transgression.

The doctrines of the modern legal systems of Germany remain true, essentially, to the old German principle. In the annals of Prussian criminal practice, we find that even when a father in a drunken fit killed his child, the offender was only punished by one year's imprisonment. Under the Bavarian Code, however, if the inebriety is intentional, and the transgressor has put himself in that state for the purpose of committing a crime, it will avail him nothing as an excuse; otherwise drunkenness is considered such an "inculpable disorder of the senses or of the understanding," as to exempt the doer of wrong from responsibility. The Austrian Code deems complete intoxication, when not indulged in with a criminal design, a ground of freedom from liability.

A learned German professor argues that, in considering whether criminality should be imputed to an offender, the only proper enquiry is, whether the actor, at the time of the act, possessed a consciousness of his deed and of its consequences, and of its relation to the law of the land; and that where this conscious knowledge is wanting imputability ceases; and that this consciousness is obliterated in one who is in a state of complete intoxication.

This writer speaks of three degrees of drunk-

enness in this connection. The first or lowest is that in which the liquor taken only promotes a quicker circulation of the blood, thereby increasing the nervous activity. The drink makes the drinker more excitable than usual, but his intellectual powers remain in their normal state, and the use of his understanding is not diminished. Here the responsibility is in no respect changed or lessened, any more than is that of one who, in a burst of joy on the receipt of pleasing news, does a light-minded and wanton act. In drunkenness of the second degree, the feelings rise to a state of passion; the imagination gains the upper hand and fills the mind with unreal visions and empty images; and the increased excitability of the drunkard clouds and misleads his consciousness, which, however, is not generally destroyed. His conduct is more excited than when sober, but he is still master of his actions, and by his whole deportment shows that he is conscious of what he is doing. It is evident that even at this stage responsibility cannot be considered at an end; and yet, on account of the deceived and confused consciousness, it is just (this writer contends) that there should be a diminution of the punishment for crimes committed in this condition. Drunkenness of the highest degree is characterized by such an entire loss or disorder of the consciousness, that the man is no longer aware of what he is doing, or at least of the

legal consequences of his deeds. The fancy is so excited that the ideas flow as fast and irrationally as in dreaming; or false notions take possession of the mind, and their unreality cannot be detected; and wild appetites arise. So, in reference to the particular crime committed by the drunken man, imputability ceases, because consciousness, as the condition of imputability, does not exist.[1]

The early doctrines of the French jurists still leaven French legislation, and in France, it would seem that drunkenness is not in any case a ground of relief from the usual punishment; but juries ofttimes so consider it and pronounce verdicts of acquittal when the criminal has proved his drunkenness. Later English jurists have also walked in the steps of their predecessors, *stare decisis* being their motto; though as we shall observe, they now admit that in some cases drunkenness diminishes the responsibility and in others exempts from punishment.[2]

We have already seen that the drunkard is considered by the sages of the English law as one *non compos mentis;* yet he is not excused in criminal cases as are other *non compotes mentis.* That quaint old legal luminary, Sir Edward Coke, calls one possessed by what Othello apos-

[1] Mittermaier, § 6.

[2] Mittermaier, §§ 3 and 4.

trophizes in the words, "O thou invisible spirit of wine, if thou hast no name to be known by, let us call thee devil," as *voluntarius daemon*. Drunkenness is a species of madness which has been called *dementia affectata*, and the rule has been long settled in England, that if the intoxication be voluntary it cannot excuse a man from the commission of any crime.[1] This law, like most of the good law which has been enunciated by the English judges, has been adopted in the American courts. STORY, J., remarks, that although insanity as a general rule produces irresponsibility, "an exception is when the crime is committed by a party while in a fit of intoxication, the law allowing not a man to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such a crime."[2] This doctrine has been reaffirmed repeatedly since the days of that great jurist; and it may now be taken as definitely settled on both sides of the Atlantic, that voluntary drunkenness, that merely excites the passions and stimulates men to the commission of crimes, neither excuses the

[1] Per PARKE, B., Rex v. Thomas, 7 C. & P. 20; ALDERSON, B., Reg. v. Makin, id. 297.

[2] People v. Lewis, 36 Cal. 531; McIntyre v. People, 38 Ill. 514; People v. Garbutt, 17 Mich. 19; Wharton's Criminal Law, § 40; Fuery v. People, 54 Barb. 319; 2 Keyes, 424.

offence nor mitigates the punishment.[1] Taylor, in his able work on Medical Jurisprudence, remarks that it is obvious that if drunkenness were to be readily admitted as a defence, three-fourths of the crime committed would go unpunished.[2] His inebriety far from being a criminal's excuse is rather an aggravation of whatever he does amiss.[3]

Aristotle considered that a man committing a crime when drunk deserved double punishment, because he doubly offended; first, in being drunk to the evil example of others, and then, in committing the crime. And the schoolmen said, *nam omne crimen inebrietas incendit et detegit.* Even the mild German holds that the man overcome by the highest degree of drunkenness is on the same footing as one, who, without any intention to commit an offence, improperly puts himself in a condition, which, as he cannot fail to know its danger, he might easily and ought to have avoided; that he is therefore liable to the reproach of *culpa*, when he commits an offence in that condition; since he might have avoided falling into it; and according to common experience, he could not have been

[1] Shanahan v. Com., 8 Bush (Ky.), 464; State v. Thompson, 12 Nev. 140.

[2] Vol. II, p. 596.

[3] 4 Black. Com. 26; Rex v. Carroll, 7 C. & P. 145; Com. v. Hart, 2 Brewst. (Pa.) 546.

ignorant, that a drunken man is no longer master of himself, and is against his will impelled to acts which in a sober state he would not have committed.[1]

The effect of strong drink depends very much upon climate. The same indulgence which would only make the blood move in Norway would make an Italian mad. President Montesquieu says,[2] a German drinks from custom founded upon constitutional necessity; while a Spaniard drinks through choice or out of mere wantonness of luxury. And he adds, drunkenness ought to be more severely punished where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy as in Germany and more northern countries.

In Pennsylvania, at one time, it seems to have been thought that if the intoxication is so excessive as totally to destroy reason, it is a defence for crime.[3]

The law is merciful and kind, and so holds that if a person by the unskilfulness of his physician, or through the malice and contrivance of his enemies, eat or drink any thing that causes madness or frenzy, he is considered to be in the same position as any other afflicted with *dementia accidentalis*, *vel adventitia*, and the ill deeds

[1] Mittermaier "On the effect of Drunkenness," etc., § 7.
[2] Spirit of Laws, B. 14, ch. 10.
[3] Com. v. Hart, 2 Brewst. (Pa.) 546.

done by him while in that state are excused.[1] Mr. Balfour Browne, in his work on "The Medical Jurisprudence of Insanity," seeks to push this doctrine very far; he says: "A very nice question arises here. We will hereafter consider the responsibility of those who have become insane through the long-continued use of intoxicating liquors, and we shall see that the law holds these upon good and sufficient grounds to be irresponsible. But there is a class between those who are insane through habit and those who get voluntarily drunk, the legal relations of which it is important to determine. It is well known that there are cases where, owing to some physical injury done to the head of an individual, a very small amount of stimulation will produce drunkenness, and the drunkenness will lead to a fit of temporary insanity. The law of England makes no distinction between an act committed by a person affected in this way and the act of an ordinary drunkard. But what is law is not always right. It is evident that if, through some bodily infirmity, a man under the influence of a small quantity of stimulants become insane, any act he may commit during such temporary insanity is partly due to the infirmity as well as to the voluntary act by which he submitted himself to the influence of the intoxicating liquor. It may

[1] Russell on Crimes, vol. I, p. 7.

be argued that the man might have refrained, and that if distinction was to be drawn between his and any ordinary case of drunkenness, there could be no reason for not taking the capacity of each individual to take stimulants into consideration in every case; that, as it is a fact that men can upon one occasion drink with impunity what upon another occasion would produce drunkenness, a man might be recognized as irresponsible to-day for an act which, if committed yesterday, would have been criminal. But it is not upon such grounds that a distinction should be drawn. It would unquestionably be absurd to say that any act committed by a man who got drunk after drinking, in his estimation, moderately, or drinking such a quantity as he had repeatedly imbibed without any loss of voluntary power, should be regarded as irresponsible for the criminal acts which might ensue. It is true that such fine distinctions are out of place in law, but it is also true that the law might recognize the fact that there is in almost all those cases in which temporary insanity follows upon the use of stimulants in those who have suffered from some cranial injury or diminution of the power of self-control, a loss of capacity to judge accurately concerning acts and their consequences. So that in such a case a man does not voluntarily make himself drunk, and if he suffers punishment for the act committed during such mental aberration he no

more takes the consequences of his own acts than a horse which is whipped, because he carries a man to a place where he stole, does."[1]

This principle, advocated by Mr. Browne as the true one, has been recognized by some, at least, of the American courts, and in Scotland also. In Michigan it was decided that if a person be subject to a tendency to insanity, which is liable to be excited by intoxication, and he is ignorant of this mental condition, having no reason from his past experience, or from information, to believe that such extraordinary effects are likely to arise from excessive drinking, he ought not to be held responsible for such extraordinary effects; and so far as a jury believes that his actions resulted from this unusual state of affairs, and not from the natural effects of his use of the intoxicating cup, or from previously formed intentions, his liability should be tested by the same standard as is the responsibility of one suffering from insanity alone.[2] Speaking of the Scotch law, Alison says: "Drunkenness is no excuse for crime; but on the other hand, if either the insanity has supervened without the panel's (the prisoner at the bar) having been aware that such an indulgence on his part leads to such a consequence; or if it

[1] The Medical Jurisprudence of Insanity. See, also, Taylor's Med. Jur. II, p. 596.

[2] Roberts v. People, 19 Mich. 101.

has arisen from the continuation of drinking with a half crazy or infirm state of mind, or a previous wound or illness, which rendered spirits fatal to the transgressor's intellect, to a degree unusual in other men, or which could not have been anticipated, it seems inhuman to visit him with the extreme punishment which is suitable where one commits a crime when simply drunk. In this case the proper course is to commit, but in consideration of the degree of infirmity, recommend to the royal mercy."[1]

The German doctrine is that crime committed during drunkenness is not culpable or punishable in any of the following cases: First. When one drinks only moderately (that is, does not exceed his ordinary allowance which does not usually produce intoxication), but yet the highest drunkenness ensues, owing to the properties of his liquor being changed against his will, and without his knowledge. Second. When one drinks under circumstances of the extraordinary effect of which he is ignorant (as drinking one's usual allowance in a wine-vault). Third. Where, although drinking immoderately and expecting to get drunk, the drinker takes measures beforehand to prevent all danger to others, which, however, through unforeseen accidents, prove fruitless. Fourth. When the intoxication occurs under cir-

[1] Principles of Criminal Law of Scotland, 654.

cumstances in which it is only through a co-operation of many occurring relations, as morbid affections, particular excitements by others, etc., that a quantity of liquor, which in the absence of these relations would not give rise to the highest drunkenness, produces that effect; and, fifth, if drunkenness is the result of disease.[1]

A recent writer on insanity thus treats of the responsibility of those whose mental derangement is caused by drunkenness; he says: "Voluntary drunkenness is no excuse for crime, and * * * the principle of this tenet is, that when a man, with his eyes open, puts himself in a position in which he may do harm to others, he ought to be regarded as responsible for the harm done; that, although the act may be involuntary, the condition in which volition was impossible was brought about by the voluntary act of the individual, and he must be regarded as responsible not only for the first act of a series, but for all those which necessarily and directly follow. The rule is founded upon the truest principles of law. But another question follows. Does a man contemplate remote possibilities in his acts, or only proximate probabilities? If he contemplates only the latter, it would be wrong to make him responsible for the former. Therefore, it is held by law, that when incapacitating disease is the result

[1] Mittermaier, § 9.

of long-continued, voluntary excesses, it would be impolitic to hold an individual thus affected as responsible for the acts which he might commit under the influence of this disease. It would, it seems to us, be utterly absurd for the law to hold that a man was responsible for any act committed by him during a period of incapacity — if that incapacity was produced by a voluntary act, however far the cause and the effect were dissociated as regards time. If such were the law, it would be impossible to make out real irresponsibility, for it would amount, in many cases, to an impossibility to determine the question as to whether any ordinary mental disease was caused by the acts of the individual, or by the inexorable circumstances of an environment in space and time which fate determines. We would go too far to endeavor to trace the fault of rendering one's self incapable to such a remote past, because it is only fair to hold a man responsible for consequences which an ordinary understanding could recognize as likely to follow from immediate acts. True, to the wise man evil must arise in time to come from any unvirtuous action in the present. But the laws were not framed with reference to wise men, but mostly with a careful regard to fools. So it would be any thing but just to regard the volitional element in the inception of a series of events as giving a character of criminality to any subsequent act which happened to be against

the law, for it is evident that the cerebral conditions may become in time an efficient cause of the act without the intervention of the will, and even in spite of the very strongest motives which would lead in an ordinary individual to abstinence from the act in question."

So considerate is the law for human frailty that it deems mental unsoundness superinduced by excessive drunkenness and continuing after the intoxication has subsided, may be an excuse for crimes or misdemeanors;[1] although it holds decidedly that drunkenness itself is no palliation. And where one by constantly "filling his head with the fumes of turbulent liquor," has caused an habitual or fixed frenzy, he is considered to be in the same position as if his madness had been at the first contracted involuntarily.[2]

Where one while under the influence of *delirium tremens*, or *mania á potu*, commits a crime, the insanity under which he is laboring excuses the crime, provided that he is not intoxicated at the time he did the deed; it is only when the wrongful act is done while the man is out of his mind because actually drunk and it is the immediate result of his drunkenness, that he is punishable.[3] This was decided on the trial of Drew,

[1] Beaseley v. State, 50 Ala. 149.
[2] 1 Hale, 32; Bradley v. State, 31 Ind. 492.
[3] United States v. Drew, 5 Mason, 28.

the master of the ship "John Jay," for the murder of his second mate, one Charles L. Clark. The defence set up was the insanity of the prisoner at the time of the homicide. It appeared, that for a considerable time before the fatal act, Drew had been indulging in very gross and almost continual drunkenness; that about five days before it took place he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterward began to betray great restlessness, uneasiness, fretfulness and irritability; expressed his fear that the crew were going to murder him; and complained of persons who were unseen, talking to him, and urging him to kill Clark, and his dread of so doing. He could not sleep, but was in almost constant motion day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said that whenever he laid down there were persons threatening to kill him if he did not kill the mate. In short he exhibited all the marked symptoms of *delirium tremens*. After some consultation the opinion of the court was delivered by Judge STORY, who said, "We are of the opinion that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offence. And the question made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is, or is

not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of the opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for every crime, because the party has not the possession of that reason which includes responsibility. An exception is where a crime is committed by a party while in a state of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crimes. But the crime must take place and be the *immediate* result of the fit of intoxication, and *while it lasts*, and not — as in this case — a remote consequence superinduced by the antecedent exhaustion of the party, resulting from gross and habitual drunkenness. However criminal in a moral point of view such an indulgence is, and however justly a party may be responsible for his acts arising from it to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed when Drew was in a fit of intoxication, he would have been liable to have been convicted of murder; as he was not then intoxicated but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offence. Many spe-

cies of insanity arise remotely from what, in a moral view, is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, etc. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence."

"The law looks to the immediate and not the remote cause; to the actual state of the party and not to the cause which remotely produced it."

This, it cannot be doubted, is good law, although few opportunities of enunciating it have, as far as we know, occurred in England. It has, however, been confirmed by other judges in America.

Thus, in Missouri, while it was expressly laid down that "temporary insanity, produced immediately by intoxication, does not destroy responsibility for crimes where the patient, when sane and responsible, made himself voluntarily drunk," the court further held that, to be punishable, the crime must be the immediate result of the fit of intoxication and committed while it lasts, and not the result of insanity remotely occasioned by previous bad habits. In the latter case it was decided that insanity is entitled to the same consideration as when arising from any other cause.[1] It follows, says Browne, that the law regarding *delirium tremens*, as it must do, as a mental disease caused by the excessive use of

[1] State v. Hundley, 46 Mo. 414.

intoxicating liquors, and as due to habitual excesses as distinguished from one voluntary debauch, cannot regard the individual thus affected as a responsible citizen; otherwise it could not exempt any insane person from the severest penalties of the criminal law. It is most difficult to discover the genesis of disease. In many cases, if the truth were known, insanity other than *delirium tremens* is the direct result of long-indulged habits of vice, and so long as the law deals with these upon the ordinary principles applicable to mental unsoundness, so long must it deal with individuals, laboring under *delirium tremens*, in the same way; and such is actually the policy and practice of the law. But to excuse crime on this ground it must have been committed during the actual insanity which characterizes it.[1] Wylie, who was tried in Glasgow,[2] was tried for murder committed during *delirium tremens;* he was found not guilty in consequence of his insanity.

Although, as has been seen, voluntary drunkenness, or temporary insanity produced immediately by intoxication, cannot excuse the commission of crime, yet where, as on a charge of murder, the material question is whether an act was premeditated or done only on a sudden heat and impulse, the fact that the accused was in-

[1] Per ERLE, Ch. J., Reg. v. Leigh, 4 F. & F. 915.

[2] 3 Irvine, 218.

toxicated has been taken to be a subject proper to be considered.[1] And so, also, when the question is whether a murder is of the first or second degree, drunkenness may be proved to show the mental state of the accused at the time of the act.[2] In Pennsylvania, in a case where the rule that intoxication is an aggravation of, rather than an excuse for crime, and that if short of destroying reason altogether it is not in any case a full defence, was affirmed, it was decided that when the destruction of reason by intoxication is so great as to render it impossible for the man to form any complete design or intention to commit murder or any thing else, proof of the intoxication will be allowed to shed light on the mental status, and thereby determine whether the killing was from a premeditated purpose or from passion excited by inadequate provocation, and so to reduce the grade of homicide from murder in the first degree to murder in the second degree, or from homicide to manslaughter.[3] But caution is necessary in the application of this doctrine, as there may be many cases of premeditated murder in which the prisoner previously nerves himself for the deed by liquor, when he (with Lady

[1] Rex v. Grindley, 1 Russ. on Crimes, 8; but see Reg. v. Carroll, 7 C. & P. 145.

[2] Colbath v. State, 2 Tex. App. 391.

[3] Com. v. Hart, 2 Brewst. 546; Kriel v. Com., 5 Bush (Ky.), 361; Payne v. State, 5 Tex. App. 35.

Macbeth) takes that which makes others drunk to make him bold, and that which hath quenched them to give him fire. In such cases, drunkenness is not to be considered as a circumstance in favor of the prisoner in determining the degree of his crime, but, on the contrary, tends to elevate the offence to murder in the first degree.[1] The burden of proving that his intoxication was of such a character and to such a degree as to entitle him to have it considered in mitigation, rests upon the accused.[2]

Even though, as we have seen, the German doctrine is that an offence, committed by a man in the highest degree of unintentional drunkenness, is imputable to the offender as *culpa* only (where he is not entirely relieved from all blame), still the jurists of Germany hold that where the accused has intentionally made himself intoxicated that he might, after the evil deed was done, plead his drunkenness in excuse, a crime committed by him in that state is punishable as *dolus;* as in such cases the criminal intention is immediately directed to the crime actually committed. The crime (they say) seems so much the more to be committed wilfully as even during the drunkenness the mind of the offender is constantly

[1] Willis v. Com., 32 Gratt.; Com. v. Jones, 1 Leigh, 598; Pirtle v. State, 9 Humph. 663; Boswell v. Com., 20 Gratt. 860.

[2] Comm. v. Hart, 2 Brewst. 546.

directed toward it; and the drinker, who wills to commit the crime, still has consciousness enough to recognize and be influenced by the deterring motives of right and of law. As to the principle which ought to regulate the punishment of crimes committed under such circumstances, however, opinion among the Germans is still divided.[1]

In cases which involve intention, or motive, as well as action, evidence as to the state of sobriety of the accused is admissible to test the capacity to decide between right and wrong.[2] As PATTESON, J., once remarked, "Although drunkenness is no excuse in any crime whatever it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention, and yet he may be guilty of very great violence."[3] So, where on the trial of a woman for an attempt to commit suicide it appeared that the unfortunate was at the time so drunk that she did not know what she was doing, it was held that this negatived the attempt to commit *felo de se*.[4] In a case of malicious stabbing with a fork a very learned judge observed, that it was his duty to tell the jury that the prisoner being

[1] Mittermaier, § 8.

[2] Reg. v. Gamlem, 1 F. & F. 90; Wenz v. State, 1 Tex. App. 90.

[3] Reg. v. Cruse, 8 C. & P. 546.

[4] Reg. v. Moore, 3 C. & K. 319.

drunk did not alter the nature of the offence. If a man chose to get drunk that was his own voluntary act; it was very different from a madness not caused by any act of the person; that voluntary species of madness which it is in a party's power to abstain from he must answer for. But that with regard to the intention drunkenness might, perhaps, be adverted to according to the nature of the instrument used. If a man used a stick a jury would not infer a malicious intent so strongly against him, if drunk when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was employed, which if used must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party. The prisoner was pronounced guilty.[1] In another English case, the prisoners were accused of killing a child by beating and kicking her, knocking her head against a beam and then throwing her down upon a brick floor. PATTESON, J., told the jury that if they were not satisfied that the prisoners had formed a positive intention of murdering the child they might find them guilty of an assault; and this was the verdict of the twelve men. In Michigan it was decided that one who took the property of another, while too drunk to

[1] Rex v. Meakin, 7 C. & P. 297.

be able to form any intent with regard to his action, could not be convicted of larceny.[1] And where there is a question of knowledge, as where one is accused of passing a counterfeit bill, the intoxication of the accused is a circumstance proper to be submitted to the consideration of a jury, and should have its just weight in determining where he knew the bill was a forgery or not.[2]

So, in England, drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given; because, in such cases, the question is, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation; and that passion is more easily aroused in a person when in a state of intoxication than when he is sober.[3] The refusal by a landlady to serve a drunken soldier with a pint of beer, or to converse with him, or a threat that she will report him to his commanding officer, is not sufficient provocation for an attack upon her with a bayonet; and, as the woman died from the effect of the wounds given her, the jury, under the direction of PARK, J., found the prisoner guilty of murder, and he was executed.[4]

[1] People v. Walker, 38 Mich. 156.
[2] Piginan v. State, 14 Ohio, 555.
[3] Rex v. Thomas, 7 C. & P. 817.
[4] Rex v. Carroll, 7 C. & P. 145.

On this side of the Atlantic it has also been held that where a provocation has been received, which, if acted upon instantly, would mitigate the offence of a sober man, and the question, in the case of a drunken man, is whether the provocation was in truth acted upon, evidence of intoxication may be considered in deciding that question.[1] In Kentucky the court, on the trial of one indicted for homicide, committed while drunk, considered that the fact of the drunkenness, while it might be a circumstance showing the absence of malice, should not be singled out from the other evidence, and held up to the jury as a mitigation of the offence. The court laid down the proper rule to be, that one in a voluntary state of intoxication is subject to the same rule of conduct and the same rules and principles of law that a sober man is, and that where provocation is offered, and the one offering it is killed, if, and only if, it would mitigate the offence in a sober man, it will mitigate the offence in a drunken man.[2] It would appear, therefore, that the English judges are a little more lenient to the drunkard than are the American courts, and it would seem rightly so.

If the evidence shows a previously formed determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the

[1] State v. McCaubs, 1 Spears, 384.
[2] Shannahan v. Com., 8 Bush, 464.

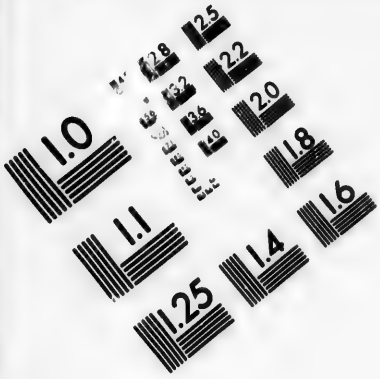
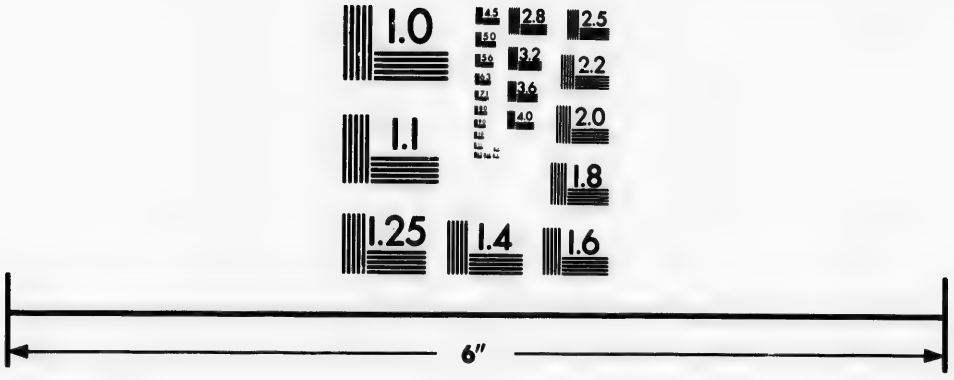
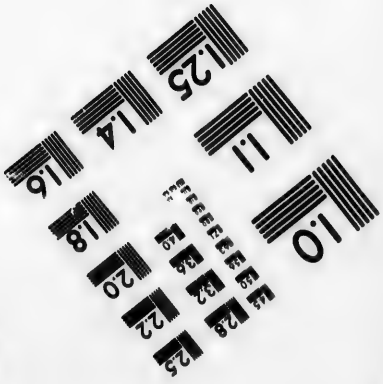


IMAGE EVALUATION TEST TARGET (MT-3)





Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

prisoner was at the time he did the deed must not be regarded; it will furnish no excuse. Upon the trial of an indictment for stabbing, the jury may take into consideration, among other circumstances, the fact of the prisoner being intoxicated at the time he struck the blow, in order to determine whether he acted under a *bonâ fide* apprehension that his person or property was about to be attacked or not.[1]

Where the question is whether words of threatening were uttered with a deliberate purpose, or were merely low and idle expressions, the drunkenness of the party using them is proper to be considered.[2]

If a statute makes an offence to consist in an act committed with a particular intent, the rule that voluntary intoxication does not excuse acts which constitute an offence includes only the consequences which do actually ensue — the crime actually committed, — and not the intent charged, if the defendant was at the time incapable of entertaining it, and did not in fact entertain it.[3]

Sometimes drunkenness affects not only the mental condition of a man, but also his physical ability to commit the crime of which he is ac-

[1] Marshall's case, 1 Lewin, 76.

[2] Rex v. Thomas, 7 C. & P. 817.

[3] Roberts v. People, 19 Mich. 101; Pirtle v. State, 9 Humph. 663; People v. Harris, 29 Cal. 678.

cused; then it is a necessary factor in determining the nature and character of the acts of the party accused, as well as his purpose and intent in doing them.[1]

If no inducement has been held out to a criminal relating to the charge preferred against him, it matters not in what way a confession is obtained from him. It can be used against him whether he was induced to make it by fair means or foul; by being made drunk,[2] or even by deception being practiced upon him, as in the case of the old ruffian in Mary Annerly. It will be equally admissible however much the mode of obtaining it may be open to censure, or may render the statement itself liable to suspicion.[3]

[1] Terrell v. State, 43 Tex. 503.
[2] R. v. Spilsbury, 7 C. & P. 187.
[3] Taylor on Evidence, § 804.

CHAPTER XIV.

CIVIL REMEDY.

VARIOUS States and Legislatures have passed statutes giving a right of action for damages caused by the sale of intoxicating liquors. These acts do not pretend to interfere with the sale, but merely endeavor to give redress and compensation for the injury actually suffered through the sale, and to make the seller responsible for the injurious results of his acts, as others — carriers, agents, physicians — are held liable. These laws do not say to the trafficker in strong drink, "Thou shalt not sell," but only "Take heed how thou sellest, and to whom thou sellest." [1]

The purpose of these acts is the suppression of intemperance, pauperism and crime. It cannot be doubted by any observant and intelligent person that the use of intoxicating liquor is the fruitful source of many of the evils which affect society. Pauperism, vice and crime are the usual concomitants of the unrestrained indulgence of the appetite for strong drink. Impoverishment of families, the imposition of public burdens, in-

[1] Bedore v. Newton, 34 N. H. 117; Bertholf v. O'Reilly, 15 N. Y. Sup. Ct. 16.

security of life and property, are consequences of the prevalence of the great evil of intemperance.[1]

While alcoholic stimulants are recognized as property and entitled to the protection of law, ownership in them is subject to such restraints as are demanded by the highest considerations of public expediency. Enactments restraining free trade in intoxicants are regarded as police regulations established for the prevention of pauperism and crime, for the abatement of nuisances and the promotion of public health and safety. They are a just restraint of an injurious use of property which the Legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom, where it is not controlled by fundamental law. It is a settled principle essential to the rights of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition that its use shall not work injury to the equal enjoyment and safety of others who have an equal right to the enjoyment of their own property, nor be injurious to the community. "*Sic utere tuum ut alienum non lædas*," is what the law says to each and every one.[2]

[1] Bertholf v. O'Reilly, *supra*, per ANDREWS, J.

[2] Lawson's, The Civil Remedy for Injuries arising from Intoxicating Liquors. Great use has been made of this booklet in this chapter.

In the States of Maine, Indiana, Pennsylvania, Rhode Island and Vermont, any person, not authorized by law, or in a manner not authorized by law, selling intoxicating liquor is liable for all the injuries committed by the person to whom it is sold, while intoxicated. Even giving the liquor will in some of the States make the giver liable. In New Hampshire and Vermont, in case of the death or injury of any person in consequence of intoxication from the use of liquor unlawfully furnished, damages may be recovered by any one dependent upon the injured party, or upon whom the injured party is dependent for support, from the person unlawfully selling or furnishing the intoxicant.[1]

In Illinois, New York, Ohio, Nebraska, West Virginia, Connecticut, Iowa, Kansas, Wisconsin, Michigan and Massachusetts, even more stringent laws are in force, whereby a right of action is given for the evil consequences of intoxication without regard to the lawfulness of the sale; and in most of these States the same responsibility is incurred even if the drink is a free gift. Every husband, wife, child, parent, guardian, employer or other person, injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, has a right of action in

[1] Hollis v. Davis, 56 N. H. 74.

his or her own name, severally or jointly, against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of any person, for all damages sustained from the effects of such intoxication, and also for exemplary damages. In some of these States the seller or giver of these dangerous beverages is further liable to recoup any one who has taken care of or provided for the drunken man while intoxicated, and for keeping him in consequence of such intoxication. Further still go the laws of New York, Illinois, Michigan and Ohio, and say that the owner of any building knowingly permitting his premises to be used for the sale of intoxicating liquor shall be jointly and severally liable with the dram-seller for all damages arising from the gift or sale of the intoxicants; and in Illinois, Iowa and Ohio any judgment recovered against the owner of the building becomes a lien upon the premises. Now, in Ohio and Wisconsin, the liability of the seller has been restricted to cases where he sells after notice given him not to sell.

Numerous have been the decisions under these various acts; well-nigh every word has been weighed in the scales of justice, and every point of attack and defence hotly contested by interested parties, and calmly adjudicated upon by impartial judges. Like the Statute of Frauds, every line

has cost a subsidy. The "other person," referred to after the husband, wife, *et hoc genus omne*, does not include within its wide embrace the drinker himself, should he chance to be injured through his own bad habits. On one occasion a man while drunk had his pockets picked; he sued the person who sold him that which had stolen his brains away. The court remarked that it is a sensible and well-understood rule of construction that when, after an enumeration, a statute employs some general term to embrace other cases, the other cases must be understood to be cases of the same general character, sort or kind with those named: and applying this rule, the party intoxicated is excluded. The persons enumerated are persons who stand to him in special relations, and it is therefore assumed that "any other person" who may sue must also stand to him in some special relation so as to be injured by the intoxication. But he could not stand in any such relation to himself.[1]

The "any person" spoken of as selling or giving away intoxicating liquors includes master, owner, son, clerk, or servant.[2] A master is liable for the acts of his servants done in the course of his business or employment, even though in the particular transaction in question his com-

[1] Brooks v. Cook, 7 Northw. Rep. 216.
[2] Worley v. Spurgeon, 38 Iowa, 465.

mand has been disobeyed. One Forrester tried to evade the law by having the liquor sold by his cook in his kitchen. As Judge BLECKLEY said, "In his kitchen, by his servant in his presence, and with his co-operation through the responses 'go to Mary' and 'give the money to Mary,' the traffic was carried on. There is little doubt the defendant was the deity of this rude shrine, and that Mary was only the ministering priestess. But if she was the divinity and he her attending spirit to warn thirsty devotees where to drink, and at whose feet to lay their tribute, he is amenable to the State as the promoter of forbidden libations. Whether in these usurped rights he was serving Mary or Mary him, may make a difference with the gods and goddesses, but makes more with men.'"[1] A master is not excused for the negligent conduct of his servant because he told him to be careful, nor for his frauds because he told him to be honest. He is not responsible for wrongs done by a servant outside his employment and unauthorized, nor if the drunkard helped himself to the liquor without the consent of owner or servant.[2] If a servant disobeys his master's express command and supplies liquor to one whom he is forbidden to furnish it, the master will not be mulcted in

[1] Forrester v. State, 63 Ga. 349.

[2] Kreiter v. Nichols, 28 Mich. 496; Peterson v. Knoble, 35 Wis. 80; Smith v. Reynolds, 8 Hun, 128.

exemplary damages, although he would be so punished ordinarily for sales made by his servants within the scope of their authority.[1]

It is no defence that the intoxication was caused partially by liquor sold by some one else; it is enough if that supplied by the defendant was in whole or in part the cause of the intoxication. For the law is that where the separate acts of two wrong-doers contribute to and jointly cause the wrong, each is responsible as though he were the sole ill-doer, of course the act must stand in the line of direct causation. If a glass of whisky is sold one day and it simply awakens an appetite which months after causes the party to seek and drink liquor to excess, such sale cannot be said to be in the line of direct causation; ut where the liquor sold is part of that which directly produces the intoxication during which the injury is done, the sale is within the statute, even though it appears that others sold intoxicants which contributed to the drunkenness. In other words it is sufficient if it appears that the liquor sold was either solely, or with what was supplied by others at or about the same time, the direct cause of the drunkenness.[2] When several persons furnish intoxicating beverages to one who

[1] Kehrig v. Peters, 41 Mich. 475; Brantigan v. White, 73 Ill. 156.

[2] Werner v. Edmiston, 24 Kans. ; Woolheather v. Risley, 39 Iowa, 486.

commits a trespass while under the influence of the drinkables so supplied they are jointly liable, and each is liable for the injury done by all, and all may be sued together, or they may be sued separately, but there can be only one satisfaction for the injury.[1] Although, indeed, it has been held under the New York statute, and even under the Iowa act, that a joint action will not lie against two or more persons who separately, at different times and at different places, and without any connection with each other, have each sold liquor which contributed to produce the intoxication causing the mischief complained of.[2] Under the Maine law of 1872, if A. sells to B., and B. to C., and C. being thereby made drunk injures D., D. can recover from B., but not from A.[3]

Where the damage proceeds not from a particular act of intoxication, but rather from a general besotted condition, those whose wares have reduced the drinker to that condition are not jointly liable with those whose liquid poison was the immediate cause of the act.[4]

[1] Bodge v. Hughes, 53 N. H. 616; Kearney v. Fitzgerald, 43 Iowa, 580; Emory v. Addis, 71 Ill. 273.

[2] La France v. Krayer, 42 Iowa, 143; Bertholf v. O'Reilly, 15 N. Y. Sup. Ct. 16; Jackson v. Brookins, 5 Hun, 530.

[3] Bush v. Murray, 66 Me. 472.

[4] Hitchner v. Ehlers, 44 Iowa. 40.

Mere inactivity on the part of a landlord to find out that intoxicating drinks are sold on his premises, or a failure to take steps to prevent such a use of the premises, will not make him liable under these statutes; he will not be responsible unless he does some affirmative act signifying his assent to the use of his property for the liquor traffic, or his permission for its continuance.[1] Nor is this too severe upon the landlord, for he certainly has power to prevent the use, by his tenant, of his premises for illegal purposes, and he can restrain the use of his property for a purpose different from that for which it was leased, or for a purpose which may be dangerous.[2] And the Court of Appeals in New York State has decided that the Legislature has full power to create a cause of action for damages in favor of a person injured in person or property by the act of an intoxicated person, against the owner of real property, whose only connection with the injury is, that he leased the premises where the liquor causing the intoxication was sold or given away, with knowledge that intoxicants were to be sold therein.[3]

In Illinois, Ohio, New York and Michigan the

[1] State v. Ballingall, 42 Iowa, 87; State v. Abraham, 6 Iowa, 117.

[2] Bennett v. Sadler, 14 Ves. 526; Mayor v. Bolt, 5 id. 129.

[3] Betholf v. O'Reilly, *supra*.

sale or gift of intoxicating liquor, contrary to the statute, works a forfeiture of all the rights of the tenant under any lease in the premises where such unlawful sale or gift takes place. In one case liquor was illegally sold in a grocery situate on a three hundred and fifty acre lot, and it was held that the lease of the whole place was forfeited.[1] No right of lien is acquired against the premises until judgment is recovered against the owner.[2]

The statutes of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin give a right of action for three separate descriptions of injuries caused by the sale of intoxicating liquors, viz.: to the person, to property, to means of support; and unless an injury in one or other of these respects is proved, no recovery can be had.[3]

To sustain an action for an injury to "the person," some actual violence or physical injury to the person or health must be proved. Fear, mortification, sorrow, loss of the drinker's society, are not enough to entitle a wife to recover damages.[4] But being driven out of her home through the threats, abusive language and intimidation of a drunken spouse, and being kept outside for

[1] McGarvey v. Puckett, 27 Ohio St. 672.
[2] Bellinger v. Griffith, 23 Ohio St. 619.
[3] Fentz v. Meadows, 72 Ill. 540.
[4] Mulford v. Clewell, 21 Ohio St. 198; Koerner v. Oberley, 56 Ind. 254.

several hours, is a physical injury sufficient to maintain an action.[1] A man may curse and swear at his wife to his heart's content, may call her the foulest of foul names before her neighbors, and may actually threaten to shoot her, without rendering his friend the tavern-keeper liable for damages, unless, indeed, the violence of his tongue has actually impaired her health.[2]

One Sager sold liquor to a young man, who became intoxicated by it, and when driving Mrs. Aldrich, his mother-in-law, home, upset the wagon and broke her arm (*in vino veritas*). Mr. A. sued S. for the loss of his wife's services, and the expenses of medical attendance upon her, and recovered compensation.[3] Any violent interference with one's person is in law an injury.

Damages caused through squandering the drinker's own property, his wife's, or any one else's, even money paid for the fiery liquid itself,[4] or the value of the property destroyed by the intoxicated man, may be recovered against the seller.[5] Young Bertholf took his father's horse and buggy to drive on Sunday, July 18, 1875,

[1] Peterson v. Knoble, 35 Wis. 80.

[2] Albrecht v. Walker, 73 Ill. 79; Calloway v. Laydon, 47 Iowa, 456.

[3] 16 N. Y. Sup. Ct. 537.

[4] Mulford v. Clewell, *supra*; Kilborn v. Coe, 48 How. (N. Y.) 141; Hemmes v. Bentley, 32 Mich. 89.

[5] Woolheather v. Risley, 38 Iowa, 187.

and went not to where he said he was going, but to Firnhaber's hotel, and drank whisky several times at the bar; drove some miles, drank again, returned to Firnhaber's and had another drink. In consequence of these repeated potations the youth became drunk, cut some bacchanalian antics on the street, and was arrested for disorderly conduct; he was detained in custody for a time, and being set at liberty started for home; on the way his driving out-jehued Jehu, so that the horse died from being driven so furiously. The saloon-keeper at Firnhaber's hotel and the owner of the premises were sued by old Bertholf; the jury found that the horse died from over-driving, and that the cruel treatment arose from the driver's drunkenness, and so both defendants were held liable for the value of the horse.[1]

The term "means of support" has been variously explained; broadly, it relates to whatever a husband might have earned or made by his labor and attention to business, and contributed to the maintenance of his family.[2] Diminution of income, or loss of property, does not constitute an injury to means of support within the fair intendment of the statute, if the complaining party has—notwithstanding the act complained of—still adequate means of maintenance from accumu-

[1] Bertholf v. O'Reilly, 8 Hun, 16.
[2] Wightman v. Devere, 33 Wis. 570.

lated capital or property; or if the income remaining is sufficient for the support of those interested. The acts are intended to protect the helpless and the dependent, not to assist to fill the already overflowing coffers of the rich or independent.[1] The law considers that a man is bound to supply his family with the necessaries, and if possible many of the comforts, of life, even if he has to work to enable him to do so; a wife (or child) has, therefore, an interest in his capacity to labor—in his wage-earning power, and as his intoxication itself affects his ability to work, it alone gives her a cause of action; and that, too, if only her future maintenance has been affected.[2]

The fact that the wife has a muscular arm, is able-bodied, and can earn a livelihood for herself by brain or hand, or has some separate estate of her own wherewith to keep the wolf from the door, will not affect her rights in this matter.[3] If a husband, when sober, and in the possession of all his faculties, either cannot or will not work, and the wife has in fact to maintain him, she cannot be said to be injured in her means of support by his intoxication.[4] In one case the husband was a cripple, and able to earn

[1] Volans v. Owen, 16 N. Y. Sup. Ct. 558.

[2] Schneider v. Hosier, 21 Ohio St. 99; Mulford v. Clewell, *supra*.

[3] Hackett v. Smelsley, 77 Ill. 109.

[4] Wightman v. Devere, *supra*.

but little for the support of his wife and four children, but he had a quarterly pension of fifty-four dollars; one pay-day he got drunk at the defendant's and lost $50. The wife sued for the amount lost, but the court held that she could only recover her proportionate share, namely, one fifth.[1]

If a father suffers an injury to his means of support by the intoxication of his son he may maintain an action against the seller of the cup that inebriates; but he must show that his son's services were necessary to his support, or that the charge or expenses brought upon him by his child's illness and incapacity, consequent upon the intoxication, diminished his means so as to render them inadequate to his maintenance.[2]

In New York, the judges have not fully concurred in the meaning given to this phrase by the courts of some of the other States.[3]

If one while drunk, and in consequence of his drunkenness, receives injuries which start him on the journey to that bourn from which no traveler returns, an action will lie against the vendor of the liquors at the suit of his wife or child.[4] This was at one time doubted under the

[1] Franklin v. Schermerhorn, 15 N. Y. Sup. Ct. 112.

[2] Volans v. Owens, 16 N. Y. Sup. Ct. 558.

[3] Hayes v. Phelan, 4 Hun, 738.

[4] Emory v. Addis, 71 Ill. 273; Jackson v. Brookins, 5 Hun, 533; Rafferty v. Buckman, 46 Iowa, 195; Roose v. Perkins, 9 Neb. 304; 31 Am. Rep. 409.

New York statute, but later decisions have set the matter at rest in that State; all injuries that are consequent upon intoxication, it is now held, are within the terms of the act; if death is the natural and legitimate result of the intoxication it is of course covered by the words of the statute. So, where several drunken men got into a fight, and one was killed, an action was successfully brought against the liquor seller.[1] But in Ohio it has been held that, under the act in force there, damages arising from the death of the intoxicated person cannot be recovered. The court followed the old common-law rule, and considered that the uncertainty, if not impossibility, of estimating the value of human life, or, in other words, the pecuniary injury arising from its destruction, undoubtedly was the reason why the common law gave no remedy. BOYNTON, J., uttered a strongly dissenting opinion.[2]

Not only can damages coextensive with the injury suffered be recovered, but also exemplary damages. Exemplary damages, however, cannot be obtained unless there is proof of actual injury to the person or property or means of support.[3] If a wife show that she has sustained injury to her

[1] Jackson v. Brookins, 5 Hun, 533.

[2] Davis v. Justice, 31 Ohio St. 359.

[3] Gaussley v. Perkins, 30 Mich. 495; Wightman v. Devere, 33 Wis. 570; Keedy v. Howe, 79 Ill. 133; Gilmore v. Mathews, 67 Me 517.

means of support she may get exemplary damages even though she fail to prove any aggravating circumstances on the part of the tavern-keeper, such as his furnishing the husband with liquor after being forbidden so to do, or his tempting or inducing him to drink;[1] but, as a rule, she will have to show some aggravating circumstances.[2] Selling on Sunday, or without a license, will not be sufficient to fix one with exemplary damages.[3] Where the seller of the cup 'with beaded bubbles winking at the brim' has been notified not to sell a particular person, or where he has placed temptations in the way of one to seduce him from the paths of sobriety, or where one who has already fallen low through the baneful effects of strong drink is endeavoring to reform and free himself from the cursed chains which bind him; if the dram-seller supplies drink to such a one, it is fit and proper to make him smart in exemplary damages.[4]

Mental suffering and anguish do not of themselves constitute a ground of action, yet where actual injury has been proved they may be considered in weighing the question of exemplary damages.[5] A wife may show that she has been

[1] Hackett v. Smelsley, 77 Ill. 109.

[2] Brantigam v. While, 73 Ill. 561; Franklin v. Schermerhorn, 15 N. Y. Sup. Ct. 112.

[3] Albrecht v. Walker, 73 Ill. 69.

[4] Kellerman v. Arnold, 74 Ill. 632.

[5] Freese v. Tripp, 70 Ill. 496; Roth v. Eppy, 80 id. 283.

excluded from society on account of her husband's intoxication, and may give evidence of her mental sufferings generally arising from his habits.[1] Any violent interference with one's person is in law an injury, and mental suffering resulting therefrom is a ground for damages.[2] In consequence of being intoxicated by liquor sold him by the defendant a husband received certain injuries; the court, in Wisconsin, held that the wife was entitled to recover compensation for her trouble in watching, nursing and taking care of him during his indisposition, damages for injuries to her own health in consequence of her attendance upon him, expenses of medical assistance and the cost of paying another for looking after his business.[3] In Illinois, where the plaintiff's husband became a confirmed drunkard, gave up his business at which he was earning five dollars a day, and squandered a valuable property, a verdict of $10,000 actual and $2,000 exemplary damages was considered not excessive.[4]

In Michigan, it has been held that the actual damages awarded should be as nearly commensurate with the actual injury as the nature of the case will permit; and exemplary damages should be given in those cases alone where the plaintiff

[1] Friend v. Dunks, 37 Mich. 25.
[2] Ward v. Thompson, 48 Iowa, 588.
[3] Wightman v. Devere, 33 Wis. 570.
[4] Jewett v. Wanshura, 8 Chi. L. N. 324; 43 Iowa, 574.

has some personal right to complain of a wanton and wilful wrong, which the wrong-doer, when he committed it, must be regarded as having committed against the plaintiff in spite of the injury he must have known the plaintiff was likely to suffer by it. And in New York it was decided that exemplary damages should be given only where there are circumstances of abuse or aggravation on the part of the seller of the liquor.[1]

The courts in Indiana have put a narrow construction upon the statute and appear to hold that the liquor-seller is not responsible for all the consequences arising from the sale of intoxicating liquors, but only for such as he may be presumed to have foreseen as likely to be the result of his selling; that he is not liable for an extraordinary and fortuitous event, not naturally resulting from intoxication; nor for an effect which is not naturally, necessarily, nor even probably connected with the selling; that the event need not indeed take place immediately or directly upon the cause, but it must be effected by a chain of natural effects and causes unchanged by human action, or the party who sold the liquor will not be responsible. So where a drunken man lay down in a wagon on his way home and a barrel rolled over him and hurt him so that he died;

[1] Gaussley v. Perkins, 30 Mich. 492; Franklin v. Schermerhorn, 8 Hun, 112.

and where another intoxicated fellow wandered on to a railway track and was run over; it was held that the wife could not recover in either case. And the court said, in the former case, that the result would be the same if a drunken man lay down under a tree and a branch blew down, or lightning struck the tree, and killed him.[1] These two decisions have been severely criticised; and it has been remarked that while the former is possibly supportable on the reasoning of the court, the latter is entirely unsupportable; that while it is not reasonably within human foresight that a drunken man will lie down in a wagon and there be killed by a barrel rolling on him, or lie down under a tree and there be killed by falling limb or thunderbolt (as there is nothing dangerous in these acts, or they might equally well happen to a sober man), yet it is easy to foresee that a drunken man might cross a track, and while so doing, in consequence of his carelessness, be killed.[2]

Indiana appears to stand almost alone in this view of the matter.[3] In Illinois it has been held that if, in consequence of abusive language used by a drunken man, he is assaulted and killed; or,

[1] Krack v. Heilman, 53 Ind. 517; Collier v. Early, 54 id. 559.

[2] 18 Alb. Law Jour. 424.

[3] Roth v. Eppy, 80 Ill. 283.

if the death of a man who receives a wound while intoxicated can be traced as the natural and probable result of a new and intervening cause, such as a felonious attack in which the wound is received, or a reckless exposure or amputation when unnecessary; in no such case will the liquor seller be responsible for the death.[1] The defendant is considered liable only for such consequences as might reasonably have been foreseen or expected. If A.'s bar-keeper sells liquor to B., and a squabble arising the bar-tender throws a glass at B., which misses him and hits C. and injures him, this hurt is not the proximate consequence of A.'s act in selling liquor.[2] It has, however, been held that where a man was wounded by the discharge of a pistol flourished by a drunken man in a train, an action lay against the liquor-seller for the damage done; and the fact that there was time between the drinking and the accident to get sober was considered not to affect the case if, in truth, the drinker had not recovered his senses.[3] And in a recent case in the Superior Court of the State, it was held that, where the plaintiff's husband was killed upon a track, by a passing railway train, while in a state of inebriation, the intoxication

[1] Shugart v. Egan, 83 Ill. 56; Schmidt v. Mitchell, 84 Ill. 195.

[2] Lucken v. People, 3 Ill. App 375.

[3] King v. Haley, 86 Ill. 106.

was the proximate cause of the death, and that the owner of the premises where the liquor had been procured was liable in damages, notwithstanding the wagon and barrel case[1] and the other Indiana case.

Relationship alone does not give a right of action.[2] A husband or wife, and each and every of their children — though their name be legion — and all other persons mentioned in the acts may each and every bring actions.[3]

Torts are divisible; so a defendant may be liable, even though he has not caused the intoxication in whole.[4] The time within which the action must be brought runs from the date of the sale of the liquor, not from the time the injury happened.[5]

The death of the husband does not put an end to the wife's right of action.[6]

What constitutes intoxication is a question of fact to be determined by the jury upon the whole evidence in the light of their own observation.[7] It would appear as if the ordinary rules of evidence were not strictly followed in these cases.[8]

[1] Shroeder v. Crawford, 94 Ill. 357.

[2] Gaussly v. Perkins, 30 Mich. 495.

[3] Franklin v. Schermerhorn, 8 Hun, 112.

[4] Roth v. Eppy, 80 Ill. 283.

[5] Emmett v. Grill, 39 Iowa, 690.

[6] Hackett v. Smelsley, 77 Ill. 109.

[7] Roth v. Eppy, 80 Ill. 203.

[8] Dunlavey v. Watson, 38 Iowa, 400; Guenerech v. Smith, 34 id. 348; Kniffen v. McConnell, 30 N. Y. 285; Hall v. Barnes, 82 Ill. 228.

The injury to the support of a wife caused by the sale of intoxicating liquors to her husband, by which he acquires habits of intemperance and idleness, may vary greatly according to the age, condition and circumstances of herself and family. Evidence of the previous sobriety and industrious habits of the man, and his subsequent idleness and extravagance, is admissible; and the jury may be instructed to consider all these circumstances.[1] A wife may also prove the number and ages of her children if she further show that the liquor-seller had knowledge that she had such children, and that they were in danger of being injured or compelled to leave home, and the defendant, after such knowledge, wantonly continued to sell the husband liquor, by reason of which she acquires a right of action. This evidence is pertinent to the question of exemplary, but not actual, damages.[2]

The court should not charge, as a matter of law, that to sell liquor to an habitual drunkard and one diseased in body and mind — through strong drink — is worse than selling it to one who has not sunk so deeply into this sin and wretchedness. This is for the jury to say.[3]

Evidence can be given to show that the drunk-

[1] Dunlavey v. Watson, *supra*; Friend v. Dunks, 37 Mich. 25.

[2] Ward v. Thompson, 48 Iowa, 588.

[3] Ludwig v. Sager, 84 Ill. 99.

ard was in the habit of visiting saloons other than that of the defendant;[1] and that the wife has been in the habit of buying liquors and drinking them with her spouse, is admissible in evidence, if she is asking for any damages to her wounded feelings.[2] If a wife knows that her husband has purchased a jug of whisky and is drinking immoderately, and she has it in her power to prevent him drinking so as to injure himself, by breaking the jar or pouring out the contents; and she, not being deterred from so doing by fear, yet stands idly by and lets her husband drink to excess, so that death ensues, she will be deemed a willing party to his conduct, and instrumental in bringing the loss of her good man upon herself.[3]

A wife will rid herself of blame if she show that she was compelled by her lord and master to go to saloons with him and drink with him,[4] or that she purchased the liquor that he craved after for him under compulsion, or to keep him at home and away from places where he would be likely to drink more.[5]

The fact that a wife has upon other occasions authorized the selling of liquor to her husband

[1] Hemmens v. Bentley, 32 Mich. 89.
[2] Kearney v. Fitzgerald, 43 Iowa, 580.
[3] Reget v. Bell, 77 Ill. 593.
[4] Jewett v. Wanshura, 43 Iowa, 574.
[5] Ward v. Thompson, 48 Iowa, 588.

will not prevent her recovering for the ill effects of a particular sale to which she did not assent; and her giving him money to enable him to satisfy his appetite for strong drink does not prove that she contributed to his intoxication, unless it is shown that the liquor which made him drunk was that purchased by means of her money.[1]

If proceedings are taken under the section of the act allowing the recovery of compensation for taking care of a person while intoxicated, the defendant may show that the drunkard had recovered from the effects of the liquor sold by him, and that the drunkenness during which he was cared for was caused by liquor sold by others.[2]

Where proceedings are taken under those acts which give a remedy only in case of a sale or gift in violation of their provisions, being of a *quasi* criminal nature, the proof must be strict. When, for instance, the action is for furnishing liquor to an habitual drunkard, it must be shown that the defendant knew him to be such, although it need not be proved that he was intoxicated at the time.[3] Knowledge of the intemperate habits of another may be proved by reputation.[4]

[1] Rafferty v. Buckman, 46 Iowa, 195.

[2] Braman v. Adams, 76 Ill 331.

[3] Markert v. Hoffner, 4 Am. L. Rec. 111; Fountain v Draper, 49 Ind. 441.

[4] Wickwire v. State, 19 Conn. 477.

As it is the object of these statutes to furnish redress and compensation to innocent sufferers from the consequences of the sale of intoxicating liquors, if one, by his own acts and conduct, voluntarily and knowingly encourages another to drink, he cannot complain of any wrong which he may suffer at the hands of one who is in a state of intoxication which he himself has assisted to produce.[1] An hotel-keeper cannot recover from a drunken man for a trespass committed when under the influence of liquor sold by himself.[2] These laws are not intended as means of speculation, but as a protection to the wife and family of the drunkard.[3]

In the Provinces of Ontario and Quebec, if a person while intoxicated assaults another, or injures any property, the person who furnished him with the liquor which occasioned the intoxication —if in violation of the law — is jointly and severally liable to the same action by the party injured as that to which the drunken man may be liable.[4]

[1] Kearney v Fitzgerald, 43 Iowa, 580, Engleken v. Hilger, id. 563.

[2] Aldrich v. Harvey, 50 Conn. 162.

[3] Confrey v Stark, 73 Ill. 187.

[4] 27 & 28 Vict., ch. 18, § 61; Rev. St. Ont., ch. 181, § 89.

CHAPTER XV.

STATUTE LAW.

IN this concluding chapter the legislation of recent years in Sweden, Great Britain, and America will be briefly referred to. Any thing like an extended notice of the statutes and decrees of the legislatures and governments of civilized nations during even the last twenty-five years would swell this book beyond its prescribed limits.

During the first half of the present century the Swedes are considered, by some, to have been the most drunken people on the face of the earth. Alison says, that about 1828 the amount of crime in Sweden was equal to that of the most depraved cities of Great Britain, and illegitimate births in Stockholm exceeded the proportion of Paris itself; and all this the historian attributes to the destructive passion for ardent spirits.[1] Every little landholder, who was prepared to pay a small fee for a license, was allowed to distil intoxicating liquors; in truth the whole country may be said to have been deluged with spirits. "There were

[1] Alison's History of Europe, vol. xv, p. 101.

150 manufactories of liquid hell fire," distilling annually thirty millions of gallons for the consumption of three millions of people; this was in 1835. A temperance movement was started in Sweden about that time; and at length in 1853 a bill was introduced into the diet which effected a complete reform in the licensing system, and which has wrought wonders in the habits of the people. The distinctive features of the system are that no individual, either as proprietor or manager of a public house or shop, can derive any private gain from the sale of spirits, or have any interest in extending their consumption; and that licenses are sold by auction for a term not exceeding three years, to persons who undertake to pay certain duties annually to the local authorities; or, if a company is formed for taking the whole number of public-house licenses, the town authorities may contract with such company for three years without an auction, subject to the confirmation of the governor of the province. Under this law the Gothenburg "Bolag" or company, was started; this consists of a number of persons who buy up the licenses for the sole object of diminishing intoxication, and pay over the profits they make on the sale of drink to the town and provincial treasuries in reduction of the taxes; they sublet to clubs and hotels.[1] In 1865

[1] Fortnightly Review, May, 1876.

when they began there were 119 licensed public houses and places for retailing spirits, by 1875 they had reduced these to 54; although there were 115 places for the sale of beer and porter not under the Bolag still, in ten years, the drunkenness was reduced 40 per cent and the profits in 1875 were about £37,000. The system is likely to spread throughout the whole country. A permissive bill is, also, in operation in Sweden, under which the local authorities may, with the sanction of the government, prohibit the trade in ardent spirits altogether.[1]

In England there are some thirty statutes in force, extending from the twelfth year of Charles the Second's reign to the forty-fourth of Victoria's, regulating (or, rather, endeavoring to regulate) the wholesale and retail trade in intoxicating liquors. Much of the annual revenue is derived from the traffic in beer and spirits, and, *per contra*, a very large proportion of the revenue is absorbed in endeavors to nullify the ill effects of the use of intoxicants and in protecting the community against those who use them to excess.

The licenses granted are of several different kinds, from those merely permitting the sale of cider to those allowing the vending of intoxicants of all sorts. They vary, of course, in their prices. The value, too, of the premises in which

[1] Samuelson, History of Drink, chap. 13.

the business is carried on is considered in fixing the duty to be paid — a gin-palace being taxed at a far higher rate than a small tavern. Sales, or attempted sales, by retail, without licenses, or in places unauthorized by the license, are prohibited and punishable by fine, imprisonment or cancellation of the license; the penalty increasing at each repetition of the offense. The court may confiscate all liquors found upon the premises of one selling illegally, and may issue a warrant to search for such things. All the occupiers of unlicensed premises are liable to the foregoing penalties, if the illegal sales have been made with their privity or consent. The holder of a license to sell intoxicants, to be drunk on the premises, incurs a penalty if he sells any spirits to a person apparently not sixteen years old.

The hours for closing taverns and saloons vary in different parts of the country; greater opportunities being given for drinking in the metropolis, and also in populous places, than in rural districts. In the metropolitan district they must be closed from midnight on Saturday until one in the afternoon on Sunday; from three until six on that afternoon, and then from eleven at night to five on Monday morning; on other days they have to be closed from half an hour past midnight until five in the morning. In other cities, towns and populous places the publican must shut up an hour and a half earlier on Saturday

night, but may open half an hour earlier on Sunday; then he has to close from half-past two until six; and at ten he must shut up for the night. On other nights he must be closed from eleven until six. In country parts these places must be closed an hour earlier at night than in the towns, except on Sunday; they, too, must observe the afternoon of the Sabbath day to keep it holy. Christmas and Good Friday are treated as Sundays. Unfortunately the local authorities have power in many cases to grant exemptions as to these closing hours. If a man has qualms of conscience, or is lazy, or has any other reason, he may take out an 'early-closing license,' or 'a six-days' license;' under the former he must shut up an hour sooner than his neighbors; under the latter he must rest on the seventh day. He gets his license cheaper, however; but if caught acting contrary to its terms he is severely fined. *Bonâ fide* travelers may be served at any hour, at any place where the proprietor is licensed to sell intoxicants to be consumed on the premises; unless, indeed, he be a six-days' man, and it is a Sunday; the courts are very kind toward thirsty souls, when considering who are travelers.

To be intoxicated in any public place, or on any licensed premises, renders one liable to a fine of ten shillings; if caught a second time within twelve months the offender may be mulcted in twenty shillings; and if a third time, in double

that sum. Any one drunk or disorderly in a public place, or drunk while in charge in any public place, of a carriage, horse, cattle or steam-engine, or when he has loaded fire-arms in his possession, may be apprehended and fined, but not more than forty shillings; or he may be sent to prison for not more than a month. If the holder of a license allows drunkenness, or violent, quarrelsome or riotous conduct on his premises, or sells to an intoxicated person, or keeps a disorderly or immoral house, or harbors a constable on duty, or permits gaming in his house, he is guilty of an offense and may be heavily fined. Any licensed person may request a drunken, violent or disorderly man to leave, and, if such individual does not go when asked, he is liable to a penalty of £5, and may be bundled out by a constable.[1]

There is a great deal of legislation both in Scotland and Ireland on these subjects, and many of the provisions of the Scotch and Irish acts are very similar to those in force in England. In Ireland, except in Dublin, Cork, Limerick, Waterford and Belfast, the taverns are altogether closed on Sundays;[2] and most beneficial effects have flowed from this law.

[1] 35 & 36 Vict, ch. 94; 37 & 38 id., ch. 49, 43 & 44 id ch. 20.

[2] 41 and 42 Vict, ch. 72.

Notwithstanding all the efforts of the legislators and the labors of philanthropists, the evils of intemperance in the United Kingdom and Ireland are enormous. Men, women and children put enemies into their mouths to steal away their brains; they with joy, pleasance, revel and applause, transform themselves into beasts. They drink and speak parrot, and squabble, swagger, swear and discourse fustian with their own shadows, through use of strongest wines and strongest drinks. Thousands and tens of thousands are the drunkards who forfeit man and do divest all worldly right save what they have by beast. Mr. Justice GROVE once said, "Men go into public houses respectable and respected, and come out felons." Justice LUSH lately, at the Bristol Assizes, gave it as his impression, derived from constant experience in every county in England, that more than half — he thought he might say considerably more than half — of the crimes brought before the courts were to be ascribed directly or indirectly to the influence of drink. Mr. Justice HAWKINS[1] did not hesitate to affirm that the great majority of the crimes that had come before him were traceable to these 'hot and rebellious liquors.' An Irish judge[2] said that the crying and besetting crime of intemperance

[1] Charge to Grand Jury, Bedfordshire Assizes, 1878.

[2] Charge at Dublin Assizes, 1878.

was a crime leading to nearly all other crimes — a crime that they might very well say led to nineteen-twentieths of the crimes in Ireland. While Mr. Justice MANISTY, at the Manchester Assizes in 1877, truly remarked that drunkenness would have to be treated as a far more serious crime in itself than it hitherto has been.

Canon Farrar, in burning words, thus addresses the people of England on the liquor traffic: "Weigh the gain and the loss; strike the balance. On the one scale place whole tons of intoxicating and adulterated liquor, put alcohol; on the other side put £150,000,000[1] a year, and grain enough to feed a nation, and grapes that might have been the innocent delights of millions; and load the scale, and you must, if you would be fair, load it with disease, and pauperism, and madness, and horrors such as no heart can conceive and no tongue tell; and wet it with rivers of widows' and orphans' tears, and if you will not strike the balance God will one day strike it for you."

In the Dominion of Canada, under the Temperance Act of 1878, any county or city may petition the secretary of State, and have a vote of the electors taken on the question of adopting that part of the act which prohibits the traffic in intoxicating liquor. If on a poll being taken the

[1] John Bull's liquor bill fell off some £30,000,000 in 1880.

majority are in favor of the adoption, then from the time named and until the vote has been repealed, no person (unless for exclusively sacramental or medicinal purposes, or for *bonâ fide* use in some art, trade or manufacture,) can expose or keep for sale, or directly or indirectly, on any pretense or device, sell or barter, or in consideration of the purchase of any other property give, to any person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating. A limited number of persons may, however, be specially licensed by the lieutenant-governor of the province, who, on proper certificate, from ministers, physicians or magistrates, may sell wine, etc., for sacramental, medicinal or mechanical purposes respectively. Manufacturers and wholesale merchants may even under this act sell wholesale to these licensed persons. The punishment for unlawful selling is fine and imprisonment.[1]

Under the Election Act, during the whole of the polling day at any election for the House of Commons all taverns must be closed, and no spirituous, fermented or strong drink sold or given away at any hotel or other place within the district, under penalty of a fine of $100,

[1] 41 Vict., ch. 16.

and, if that is not paid, imprisonment for not more than six months.[1]

Besides these Federal acts the various provinces have license laws regulating the liquor traffic. In Ontario,[2] all places where intoxicating liquors are sold must be closed from seven o'clock on Saturday evening until six on Monday morning; also on all election days. Any innkeeper or saloon-keeper, or person in his employ, who furnishes liquor to a person who while intoxicated from such liquor commits suicide, or perishes by cold or accident, is liable to the personal representatives of such person to an amount not exceeding $1,000, and it is not necessary for the claimant to show actual damage. The husband, wife, parent, brother, sister, guardian, or employer, of any person in the habit of drinking to excess, may notify sellers of liquor not to furnish such person with drink; and if the parties notified neglect the notice they are liable to the party giving the notice in an action for personal wrong to an amount not exceeding $500. Money paid for liquor sold contrary to law may be recovered back; and securities given for payment of intoxicating drinks sold in violation of law are wholly null and void, except in the hands of *bonâ fide* assignees for value without notice. Some of the licenses may be only beer and

[1] 37 Vict., ch. 9 (Dom. of Can.).
[2] R. S. Ont., ch. 181.

wine licenses, authorizing the traffic by retail in lager beer, ale, beer, porter and native wines made in Ontario from Ontario vines, and containing not more than fifteen per cent of alcohol.[1] Under the Temperance Act of Ontario[2] the council of any municipality may pass a by-law for prohibiting the sale of intoxicating liquors, and the issue of licenses therefor; or thirty electors may propose such a by-law and demand a poll to determine whether it shall be adopted. If such a by-law be passed no one, except for medicinal, mechanical or sacramental purposes, can sell or barter any intoxicating liquor, or any mixed liquor capable of being used as a beverage, or part of which is spirituous or otherwise intoxicating, within the municipality.

Well nigh every phase of legislation upon the subject of intoxicating liquors may be studied in the United States. Samuelson says, that "in no people has the transition from intemperance to sobriety been so marked as in those of the United States;" and much of the improvement is due to wise legislation — the rest to public opinion. As early as 1821, a law was passed which placed the property of habitual drunkards in the hands of a committee of the Court of Chancery, like that of lunatics. For the first half of the century,

[1] 44 Vict., chap. 27.

[2] R. S., ch. 182.

however, reformers trusted chiefly to moral suasion for curing the evils of intemperance. In 1852 a prohibitory liquor law was passed in Vermont, and from that time to the present, war has been waged in most of the State Legislatures against the liquor traffic. As might be expected the friends of temperance and total abstinence have not been equally successful all along the line; in some of the States much drunkenness still exists; in others "there are places where it is almost impossible to obtain intoxicating drinks, and where drunkenness is unknown." In some parts "perpendicular drinking," as Dickens calls 'treating;'[1] in others, the slang names of drinks, in which there is really little alcohol, such as gin-slings, cocktails, tangle-legs, eye-openers, morning-glories; often deceive strangers, and make things appear worse than they are.

Many years ago in Maine, the so-called "Maine Liquor Law" was enacted. Under this statute both the manufacture and sale of intoxicating liquors are forbidden, except for medicinal, mechanical and manufacturing purposes; and for these uses they can only be obtained through the municipal authorities. Ale, porter, strong beer, lager beer, and all other malt liquors, wine and cider, as well as all distilled spirits, are deemed intoxicating liquors.[2] Breaches of the law are pun-

[1] Samuelson, ch. XIV.

[2] Rev. Stat. ch. 27, 1872.

ished severely by fine and imprisonment. Any person injured in person, property, means of support or otherwise, by any intoxicated person, or by reason of his intoxication, has a right of action against the seller. Quarrelsome drunkards, or those disturbing the peace even of their own domestic circle, may be imprisoned for thirty days. No action can be brought on any claim or security contracted or given for intoxicating liquor, sold in violation of the act, unless the security is in the hands of a *bonâ fide* holder for value without notice. The sale of intoxicants to any minor without the written direction of his parents, or to any Indian, soldier, drunkard, intoxicated person, or intemperate person of whose intemperate habits the liquor-seller has been notified by parents or officials, is forbidden. Judge DAVIS, of the Supreme Court of the State, says: "No man who has lived in the State for twenty years, and has had an opportunity to know the facts, can doubt that the Maine law has produced a hundred times more visible improvement in the character, condition and prosperity of the people than any other law that was ever enacted."[1]

New Hampshire has, also, a prohibitory law, under which the traffic in alcoholic liquors (ex-

[1] The Maine Law Vindicated, p. 7.

cepting by duly-appointed agents) is illegal. Neither the State nor the municipalities derive any revenue from the sale of intoxicating drinks —from the vices and miseries of the people, as the emperor of China put it.

Vermont, as has been said, has had a prohibitory liquor law for thirty years, which has been amended from time to time. It has, also, a Civil Damage Act. Under a statute of 1876 every saloon, restaurant, grocery, etc., and bar-room and drinking place is held and regarded as a common nuisance, kept in violation of the law, and the court can order it to be shut up. Drunken people may be arrested and detained till sober, and then compelled, under pain of imprisonment, to disclose where they obtained their drink. Massachusetts formerly had a prohibitory law, but in 1875 its Legislature passed a license law to regulate the sale of intoxicants; under this no spirits or intoxicating liquor can be sold between midnight and six A. M., nor on the Lord's day, except by innkeepers to their guests, nor to a person known to be a drunkard, nor to an intoxicated person, nor to a minor. The licenses are of various classes; those for light drinks being much less expensive than those to sell spirits; the money goes to the municipality and the State. Policemen and officials of the city may, at any time, enter the licensed premises to see how the business is conducted, and to preserve order. Various

stringent penalties are enacted for the punishment of breaches of the act. In that Commonwealth there is, also, an act authorizing the seizure, destruction or sale of intoxicating liquors exposed and kept for sale contrary to law.

A statute forbidding the keeping for sale, without authority, of spirits or intoxicating liquors, does not apply to druggists who keep them only to mix with other ingredients to be used as medicines.[1]

Rhode Island has a license law passed in 1875. The municipal authorities grant the licenses to sell as they think proper. The sale is prohibited on Sundays, or to any minor or person of notoriously intemperate habits. It was held, by the Supreme Court of this State, that a statute is unconstitutional which makes it the duty of a jury, trying a case of unlawfully selling liquors, to convict the accused upon simple proof of the reputation of his place, or of the bad character of its frequenters, or of his having the implements and appurtenances of a grog-shop.[2] Connecticut at one time had a prohibitory law; now it has gone back to a license law similar to that in Rhode Island. Under it it is a misdemeanor, punishable by fine or imprisonment, to sell to any minor any spirit or

[1] Com. v. Hallet, 103 Mass. 452; Com. v. Butterick, 6 Cush. 247; Com. v. Ramsdell, 23 Alb. L. J. 414.

[2] State v. Beswick, 23 Alb. L. J. 487; 13 R. I

intoxicating liquor, ale or lager beer, or to any drunkard, knowing him to be such, or to any father, mother, husband, wife or child, after notice from either father, mother, husband, wife or child not to sell to the other, or to any intoxicated person. Unlicensed selling is also a misdemeanor. No liquors are to be sold, nor are places where they are sold to be kept open between midnight and five in the morning, nor on any election day. Here it has been held that a statute making the reputation of keeping a place where liquors are illegally sold, where clearly established, decisive evidence that liquors are, in fact, kept there for sale, is not unconstitutional. Of course, the defendant may show the reputation is unfounded.[1]

In New York State the licensing system is in vogue under an act passed in 1857, and amended from time to time. Licenses are granted by a commission appointed by the municipalities. To obtain a license to sell liquor to be drunk on the premises, a person must be of good moral character. As PARK, Ch. J., says, "the crime of selling intoxicating liquors is peculiar. Other crimes need concealment; this cannot be successfully carried on in secrecy. The occupation requires the broad light of day. A liquor establishment is as well known to the community in which

[1] State v. Morgan, 40 Conn. 44; State v. Thomas, 23 Alb. L. J. 489; 47 Conn.

it exists, as a grocery, dry goods, mechanical or manufacturing establishment would be. Its customers are easily distinguishable from others. They can be easily recognized at a distance. They loiter about the establishment as drones about a hive, and constitute a sign for the place as unmistakable as in one in letters over the door." In New York, the sale to Indians and apprentices and minors (without the consent of their guardians), or to any intoxicated person, is forbidden. So likewise, the selling upon Sundays or election days, or to any habitual drunkard after being notified not to do so A license may be revoked for breaches of the law; and a person selling to any one to whom it is unlawful to sell is liable for all damages flowing from that act. Common carriers continuing to employ any servant shown to have been intoxicated while on active duty in any work where negligence would endanger life, limb or property, are liable to a fine. Being drunk in any public place is a misdemeanor punishable by fine and imprisonment. Debts for spirituous liquors cannot be recovered. To the Civil Damage Act to suppress intemperance, pauperism and crime, reference has already been made, as well as to the rights and responsibilities of landlords and tenants.

New Jersey, also, has a licensing law; under it permits to sell vinous, spirituous and other strong drinks are issued by the excise comm-

sioners. The provisions of this act forbidding the sale of liquor in certain cases are very similar to those of the New York law. Local option laws are in force, in parts of the State, under which the people may by ballot determine whether or no any license shall be granted in their locality to sell malt, vinous, spirituous or intoxicating liquors. The constitutionality of this law was strongly contested, but the Supreme Court held that it was within the province of the Legislature of the State to confer upon a city the right, by a majority of its inhabitants, to pass ordinances for the regulation or suppression of the retail trade in ardent spirits. Pennsylvania has license laws very similar to those already mentioned.

In Kentucky, under the act to regulate the sale of spirituous or vinous liquors, the voters of any district, town or city may decide whether or not spirituous, vinous or malt liquors shall be sold therein. But this law does not apply to manufacturers or wholesale dealers, nor to the sale for medicinal purposes. Ohio has a prohibitory clause in its Constitution; it has not, however, stopped liquor-selling or liquor-drinking. There is, also, a Civil Damage Act to provide against the evils resulting from the sale of intoxicating drinks. North Carolina has, since 1874, had an act to prohibit the sale of spirituous liquors in townships where the people so determine. Texas,

in 1876, passed a statute to prohibit the sale, exchange or gift of intoxicating liquors in any county, justices' precinct, city or town, in the State, that may so choose; prescribing, also, the mode of voting, and affixing a punishment for the violation of the law. Arkansas has a law providing for the determination, by qualified electors, whether licenses shall be granted to any person to keep a drinking-saloon or dram-shop.

Iowa possesses a prohibitory law, forbidding the manufacture or sale of intoxicating liquors, except for mechanical, medicinal, culinary and sacramental purposes; and excepting also beer, cider from apples, and wine from grapes, currants and other fruits, grown in the State; and, as to sale, further excepting foreign importations of liquors under the authority of the laws of the United States. Keepers of hotels, saloons, eating-houses, and groceries and confectioners are not allowed to sell intoxicating liquors under any circumstances, and those persons who are allowed to sell for the purposes mentioned must have licenses. Michigan has a "liquor-tax law," imposing a tax upon the business of manufacturing, selling or keeping for sale distilled or malt liquors, or mixed liquors. Illinois and Wisconsin have license and civil-damage laws. In the latter State liquor must not be sold or given away to spendthrifts. In Kansas, until very lately, there was a license law, and the petition for license had to

be signed by a majority of the adult residents of the ward or township; now a very stringent prohibitory law has been passed. In Nebraska licenses are issued upon the petition of ten freeholders, setting forth that the applicant for leave to sell strong drink is of respectable character and standing; and the fees are devoted to school purposes. The fee is $1,000. (There is some dry humor about legislators in that State.) Treating is forbidden.

Minnesota has a license law of the same general character as those mentioned, but with a special provision forbidding legalized vendors of intoxicating liquors to sell, bargain, furnish or give away such liquor to any minor, pupil or student in any institution of learning, or to any intemperate person or habitual drunkard. The license law of West Virginia makes it unlawful to sell inebriating drinks behind any screen, frosted window or other device designed to protect the seller or the drinker from public observation; the law also makes sellers responsible for the care and maintenance of those whose intoxication they may have occasioned, and provides for the collection of damages by the families and friends of drunkards. Missouri and Mississippi both have laws permitting this traffic under certain restrictions; a majority of the voters or tax payers must join the publican in his petition for leave to supply those to whom the poet cries,

Nose, nose, nose, nose,
And who gave you that jolly red nose?

and who reply — beside the mark —

Liniment and ginger, nutmegs and cloves,
That gave me jolly red nose,

with that "wet damnation" which really washes out the true color of so many manly faces and drowns so many souls.

A law passed in California making it a misdemeanor to employ a female, or for a female to be employed, in any dance house or where liquors are sold or used, is unconstitutional; for no one — under the constitution — is to be disqualified by sex from entering upon any lawful business, vocation or profession.[1]

"This, then, is the position of the drink question in America. The contest between the sober portion of the community on the one hand, and the drink-sellers and their depraved customers on the other, a contest in which the State very properly sides with the cause of temperance, has successfully reached a stage far in advance of that which it has attained in Great Britain, and the people are devoting their energies and their inexhaustible resources to arrive at a practical solution of the problem which has hitherto puzzled all men and all ages."[2]

[1] Ex parte Maguire, 7 Pac. C. L. J. 857.
[2] Samuelson, History of Drink, ch. XIV.

INDEX.